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S
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1.2

Ct. Brit. Court of Chancery.

CASES IN BANKRUPTCY,

BY

THOMAS C. GLYN, Esq.

OF LINCOLN'S INN, BARRISTER AT LAW, AND COMMISSIONER OF BANKRUPTS,

AND

ROBERT S. JAMESON, Esq.

OF THE MIDDLE TEMPLE, BARRISTER AT LAW.

CONTAINING

Reports of Cases

DECIDED BY

LORDS CHANCELLORS ELDON AND LYNDHURST,

AND BY

VICE CHANCELLORS SIR JOHN LEACH, SIR ANTHONY HART, AND SIR LANCELOT SHADWELL,

From Hilary Term 1825 *to Easter Term* 1828.

AND

A DIGEST

OF ALL THE CONTEMPORARY CASES RELATING TO THE BANKRUPT LAWS IN THE OTHER COURTS.

VOL. II.

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1828.

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ADVERTISEMENT.

It has been thought convenient to the profession to continue the use of Mr. Glyn's name to the close of the Second Volume, though the Cases in this Part have been prepared by Mr. Montagu and myself. These Reports will from this time be continued by Mr. Montagu and Mr. Macarthur.

R. S. JAMESON.

Lincoln's Inn,
Easter Term 1828.

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And for the better information of all parties interested, I do hereby further order, that the said commissioners do state in such certificate what proportion in number and value the creditors assenting to such composition bear to the creditors who shall have proved debts of the amount of 20*l.* and upwards under the commission; and also whether any sale has been made of the bankrupt's estate, in order that provision may, if expedient, be made for confirming the same.

ELDON, C.

April 23, 1828.

The LORD CHANCELLOR has directed that after the 30th day of April instant the Messengers to the commissioners of bankrupts be annexed to the different lists in the following order; namely,

Mr. *Wright* to the 1st and 2d lists.
Mr. *Page* to the 3d and 4th lists.
Mr. *Nixon* to the 5th and 6th lists.
Mr. *Burwood* to the 7th and 8th lists.
Mr. *Johnson* to the 9th and 10th lists.
Mr. *Hamlet* to the 11th and 12th lists.
Mr. *Cutten* to the 13th and 14th lists.

And his Lordship has also directed that the business of every commission issued after the said 30th day of April instant, be conducted by the Messenger of that list to which such commission shall be directed.

FRANCIS BARLOW, *Secretary, &c.*

This order is not to have reference to any commissions already issued, or which shall issue previous to the 1st day of May next.

FRANCIS BARLOW.

CASES

IN

BANKRUPTCY.

Ex parte ELGAR. — In the matter of MANTLE.

L. C.
LINC. INN.
1823.
1826.

Monies advanced by the petitioner to the bankrupt, secured by promissory notes, whereby the bankrupt promised to pay after three months' notice the monies advanced with interest at 5 per cent. Two years' interest had been paid before the commission, but no notice had been given. Held, that the petitioner was entitled to prove the principal monies and interest up to the commission. (*a*)

THIS was a petition for proof of a debt in respect of monies at three several times advanced by the petitioner to the bankrupt, to the amount of 700*l.* in the whole, for which advances three promissory notes had been given by the bankrupt, and such promissory notes were, with a variation only as to dates and sums, in the form following:—"Dover, month 10th, 1818. I promise to pay Mary Elgar or order, after three months' notice, the sum of 150*l.*, together with interest due thereon at five per cent., for value received. Thos. Mantle." Two years' interest had been paid by the bankrupt on the promissory notes, according to the tenor of them, prior to the commission; and receipts for such interest were indorsed on the notes, but no notice had been given. The commission issued the 1st of February 1821. The commissioners rejected the

(*a*) See *Clayton* v. *Gosling*, 5 *B.* & *C.* 360.

1

1821.

Ex parte ELGAR. In the matter of MANTLE.

proof in respect of these notes, as no notice had been given prior to the commission. The petition prayed, that the petitioner might be admitted to prove the said principal sum and interest at five per cent. up to the date of the commission.

Mr. *Hart* and Mr. *Ching* for the petitioner.

Mr. *Horne* for the assignees.

31 *July* 1821.

The VICE-CHANCELLOR ordered, that the petitioner should be at liberty to bring such action for the said debt, or on the said notes, as she might be advised; or otherwise, that an issue should be directed to try whether the bankrupt was or not indebted to the petitioner at the time of the issuing the said commission, in any and what sum or sums of money, with a direction that the petition should be retained in the meantime.

Aug. 1821.

The petitioner appealed to the Lord Chancellor against this order, alleging, in her petition of appeal, that the said order was in fact a refusal to permit her to prove, by reason that the dividends payable under the commission on the petitioner's said debt would not be sufficient to cover the expence of bringing such action, or trying such issue, even if she succeeded therein.

Mr. *Hart* and Mr. *Ching* argued, that whatever difficulty might arise as to the proof of these notes by an indorsee, if they had been negociated, that the petitioner, the original payee, might resort to the actual consideration, and prove in respect thereof: the payment of interest must be considered as evidence that the parties treated the consideration as an immediate debt.

1823.

Ex parte ELGAR. In the matter of MANTLE.

Aug. 1823.—The LORD CHANCELLOR expressed considerable doubt as to the right of proof, and stated that he would take an opportunity of obtaining the opinion of the judges of the Court of King's Bench upon the point.

Hilary Term 1826.

The LORD CHANCELLOR said that he had conversed with the judges upon it, and that, in concurrence with them, he thought that the payment of interest was a material circumstance in this case, and was to be considered as evidencing that the parties had dealt with these notes as an immediate debt, and that upon the particular circumstances therefore, the petitioner should be admitted to prove her debt and interest up to the commission. The Vice-Chancellor's order was discharged, and it was ordered accordingly. (*a*)

(*a*) Whether, without reference to the payment of interest, advances secured by such promissory notes would not now be proveable as contingent debts, under the 56th section of the 6 G. 4. c. 16., if not proveable without the aid of that section; and whether, where the commission, the rejection of the proof by the commissioners, the order of the Vice-Chancellor, and the argument on the appeal, were before the passing of that Act, the petitioner was entitled to the benefit of that clause, which came into operation before final judgment was given on the petition of appeal. *Quære.* See *Clayton* v. *Gosling*, 5 *B. & C.* 360.

L. C.
LINC. INN.
Feb. 1825.

Ex parte THOMAS HUSBANDS the elder, and THOMAS HUSBANDS the younger. — In the matter of ISAAC BLACKBURN and PETER BLACKBURN.

A. and B. were in partnership, B. being a secret partner, and A., on the partnership account, drew bills in his own name on B., which were accepted by him: Held, on the bankruptcy of A. and B., that the holder of these bills, who was ignorant of the partnership, was not entitled to prove them against the joint estate of A. and B., and the separate estate of B., but that he was entitled to prove them against the separate estates of A. and of B.: Held too, that the holder, having proved against the joint estate, might, after a declaration of dividend of the joint estate, retire from that proof, and prove against the separate estates.

THIS was an appeal from an order of the Vice-Chancellor, made on the 5th of July 1820, whereby it was ordered that this petition should be dismissed, with costs. The facts of the case, and the judgment of the Vice-Chancellor, are reported 5 *Mad.* 419. The petition of appeal prayed, that the order might be discharged, and that the petitioners might be allowed to prove against the separate estate of *Peter Blackburn*, in addition to the proof against the joint estate of *Isaac Blackburn* and *Peter Blackburn;* and that in case the Lord Chancellor should be of opinion that the petitioners were not entitled to a dividend under both estates, that the petitioners might be at liberty to prove against the separate estate of *Isaac Blackburn* and of *Peter Blackburn* respectively.

Mr. *Pepys* and Mr. *Glyn*, on behalf of the assignees, resisted the double proof, against the joint estate of *Isaac Blackburn* and *Peter Blackburn*, and the separate estate of *Peter Blackburn;* and contended, that if the petitioners availed themselves of the legal liability of *Peter Blackburn*, as a dormant partner of *Isaac Blackburn*, that they must confine themselves to that legal liability, and departing from the apparent liability on the face of the instrument, must stand in the situation of joint creditors with a separate security, and must elect: that the right of double proof, in cases where a firm and some of the members of the

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firm were distinct parties to a bill, proceeded on the principle, that credit was given to the parties as distinct, in ignorance that the firm comprised the other parties: that the proof could not now be transferred to the two separate estates, as the voting in the choice of assignees, and the declaration of dividends on the joint estate, had concluded the petitioners. Ex parte *Liddell*, 2 *Rose* 34. Ex parte *Adam*, 1. *V.* & *B.* 493.

Mr. *Montagu* and Mr. *Rose*, for the appellants, contended, that the petitioners, being ignorant that the drawer was a partner in the firm represented by the acceptance, were entitled to double proof: that knowledge of the fact after they took the securities was immaterial: that the discovery of the dormant partner gave a right to proceed against both partners; and proceeding against both could not affect their right as against the separate estate of the acceptor, to which they had given credit: that their proof against the two separate estates was indisputable, unless they had done any acts amounting to a conclusive election: that in ex parte *Bigg*, 1 *Mont. B. L.* 240, the Lord Chancellor had permitted a creditor to retire from his proof, even after he had signed the certificate; and that in this case the signature of the certificate, if it were so, would be immaterial, as the petitioners have, in either view, a right to sign both certificates; and that the mere declaration of dividend had never been held a conclusive election.

The LORD CHANCELLOR.

The circumstances of this case are peculiar, and create some embarrassment in the application of well-known principles of the bankrupt law. It is clear, that where a party takes a bill, drawn by some members of a firm

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carrying on a distinct trade, on the firm, in ignorance that the drawers constitute part of the firm of the acceptors, proof is admitted against both the drawers and acceptors; and it is equally clear, that a person holding a joint and separate security for the same debt is in bankruptcy bound to elect. In this case, however, the bills are accepted by the dormant partner of the partnership of *Isaac* and *Peter Blackburn*, carrying on business under the name of *Isaac Blackburn*, and are drawn by *Isaac Blackburn*, in his individual name indeed, but as I must take it, on the evidence, in his name as representing the firm of the two bankrupts. It does not appear to me, that this case ranges itself within that class of cases in which, contrary to the ordinary rule in bankruptcy, the holder has been allowed to pursue the contract appearing on the face of the bills, and to have double proof. But I do not think that the petitioners are concluded by any thing that has passed, so as to be prevented now from withdrawing the proof against the joint estate, and being admitted as creditors on the two separate estates. (*a*)

4th Jan. 1825.

It was ordered, that the order of the Vice-Chancellor should be discharged, and that the appellants should be at liberty to prove their debt, as well against the separate estate of *Peter Blackburn* as against the separate estate of *Isaac Blackburn;* and that the proof made by the appellants against the joint estate of the bankrupts

(*a*) As, according to the late decisions in the Court of King's Bench, ex parte *Enderby*, in the matter of *Gilpin*, 2 *B. & C.* 389. and *Smith* v. *Watson*, *ibid.* 401., the partnership property must be considered in the bankruptcy as in the order and disposition of *Isaac Blackburn* and forming part of his separate estate, the first point raised in this case would not arise.

should be expunged; and that the costs of the appellants and respondents, of and occasioned by the said petition, should be paid and borne out of the respective separate estates of the said bankrupts; and that the same should be apportioned between the said estates according to the amount of the effectual funds received on account of each estate.

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Ex parte HUNTER and others, Assignees, &c. *Ex parte* REYNER. — In the matter of GOODCHILD.

L. C. LINC. INN. *Aug.* 23.

C. and Co. being embarrassed, the Bank of England agreed to advance them 40,000*l.* upon acceptances of the friends of C. & Co. The acceptances were given, and the acceptors, or in case of any of them dying, declining, omitting, or ceasing to renew any substituted acceptors, were secured by C. & Co. assigning to trustees for that purpose certain property in America. Two of these acceptances were thus: C. & Co. drew a bill on J. and W. J. for 2,500*l.*, which they accepted, and it was indorsed by C. & Co. to the bank. R. accepted another bill to that amount, drawn by J. and W. J., which was also given to the Bank. The bills, when they became due, were renewed. Before the renewed acceptance of J. and W. J. became due, they stopped payment; and R. the drawer being called upon, he obtained an acceptance from C. T. T., and indorsed it to the Bank, and the acceptance of J. and W. J. was thereupon delivered to him. J. and W. J. becoming bankrupt, R. proved the amount of their acceptances in his possession, and received 18s. in the pound. Held, on appeal, that the proof was right.

THE petition by the assignees of *Goodchild* and Co. stated, that by indenture of the 10th of October 1814, and made between *Joseph* and *John Corsbie*, and several other persons, parties thereto, among whom were *Joseph Reyner*, and *John* and *William Jackson*, of the house of *Goodchild* and Co., after reciting that the Governor and Co. of the Bank of England had agreed to lend to *Joseph* and *John Corsbie* the sum of 40,000*l.*, upon receiving the acceptances of the said *Joseph Reyner* for the sum of 2,500*l.*, and the said Messrs. *John* and *William Jackson* for the like sum, to be respectively drawn upon each other, and the acceptances of the other parties thereto, in like manner drawn upon each other, which acceptances, amounting in all to the sum of 40,000*l.*, were made payable two months after date,

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but which were to be renewed by the Governor and Co. of the Bank of England for the space of twelve months. Messrs. *Corsbie* assigned certain property in the West Indies to *W. Sims*, *C. T. Thornhill*, and *John Buck*, in trust, to secure the several parties accepting against all loss in respect of their acceptances. "And it was by the said indenture expressly agreed and declared to be the true intent and meaning of all the parties thereto, and of the said indenture, that if any or either of them should decline or omit or cease to renew their or either of their acceptances in manner before mentioned, then that they the said *W. Sims*, *C. T. Thornhill*, and *John Buck*, or the survivor of them, should stand and be possessed of and interested in the said trust property to and for the benefit of such person or persons as should thereupon be substituted and succeed in accepting, drawing, and transacting the same or the like acceptances, in like manner and as fully in all respects as such party so dying or ceasing was, could, or might be entitled or indemnified, under or by virtue of the said indenture, or the trusts therein-before contained."

That in conformity with the intention of the said indenture, the several acceptances of *Joseph Reyner*, and of *John* and *William Jackson*, for the sum of 2,500*l.*, were respectively, as the same became due, renewed by other bills, in like manner drawn by *Joseph Reyner* and *John* and *William Jackson*, upon each other, for the like sum of 2,500*l.*, viz. on the 15th of October 1814, the 19th of December 1814, and the 22d of February 1815, and which were respectively indorsed by *Joseph* and *John Corsbie*, and discounted to them by the Governor and Company of the Bank of England.

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That in the month of June or July 1815, and before their last-mentioned acceptance became due, *John* and *William Jackson* suspended their payments, upon which the Governor and Company of the Bank of England required another bill of exchange to be substituted in the room of the bill for 2,500*l.*, then outstanding and becoming due; in consequence whereof, and before such last-mentioned bill became due, *Joseph Reyner* drew another bill for the same amount upon *C. T. Thornhill*, which was accepted by him, and delivered to the Governor and Company of the Bank of England, and received by them in substitution of the acceptance of *John* and *William Jackson*, which was thereupon delivered up to the said *Joseph Reyner*.

That the period of twelve months, to which the Governor and Company of the Bank of England had agreed to extend their loans, by renewal of the said bills, expired in the month of September 1815, but in respect of half the said sum of 40,000*l.* was extended six months, upon immediate payment of the remaining half. That the acceptance of *C. T. Thornhill*, so substituted for that of *John* and *William Jackson*, was discharged by payment by the trustees, out of the trust funds, of the sums of 485*l.* 8*s.* 3*d.*, and by payment of 764*l.* 11*s.* 9*d.* by the said *C. T. Thornhill*, and by another acceptance of the said *C. T. Thornhill*, of a bill drawn upon him by *Joseph Reyner*, for the sum of 1,250*l.*, and delivered to the Governor and Company of the Bank of England; whereupon the acceptance of the said *C. T. Thornhill* for 2,500*l.* was delivered up to him. That the acceptance by the said *Reyner* for the sum of 2,500*l.* was in like manner and at the same time discharged, by payment by the trustees of the sum of 485*l.* 8*s.* 3*d.*, and by payment by the said *Joseph*

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Reyner of the sum of 764*l.* 11*s.* 9*d.*, and by his acceptance of a bill drawn upon him by *C. T. Thornhill*, for the sum of 1,250*l.*, and delivered to the Governor and Company of the Bank of England; whereupon the acceptance of *Joseph Reyner* for 2,500*l.* was delivered up to him.

That in November 1815 *Joseph* and *John Corsbie* became bankrupts, whereupon the Governor and Company required payment of the remaining half of their loan; and *C. T. Thornhill* having stopped payment, *Joseph Reyner* paid to the Governor and Company of the Bank of England the amount of *Thornhill*'s said acceptance for 1,250*l.*, as well as his the said *Reyner*'s own acceptance for the same amount.

That previously to the indenture of the 10th of October 1814, *C. T. Thornhill* had guaranteed *Reyner* from the consequences of drawing on and accepting the bills of *John* and *William Jackson*.

That on the 10th of November 1815 a commission had issued against *John* and *William Jackson*, under which, in December 1815, *Reyner* had proved a debt of 2,500*l.* upon the bill of exchange of that amount accepted by the *Jacksons* (the assignees not then being aware of the indenture and the several circumstances above mentioned relating to such acceptance), upon which proof *Reyner* had received dividends to the amount of 18*s.* in the pound. The petition prayed, that the proof might be expunged, and that *Reyner* might be ordered to refund the dividends received by him, together with interest at five per cent. upon the same, and that the bill of exchange for 2,500*l.* so proved might be delivered up by *Reyner* to the petitioners; or otherwise,

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that a moiety of such proof might be expunged, and that a like proportion of the dividends might be refunded, with interest, and the bill be delivered up.

The affidavit of *Reyner* contradicted that part of the petition which stated, that upon the insolvency of *John* and *William Jackson* the Bank of England required another bill to be substituted in the room of the bill for 2,500*l.* accepted by the *Jacksons*, and then outstanding and becoming due; and that in consequence thereof, before such bill became due, *Reyner* had drawn another bill for the like amount, which had been accepted by *Thornhill*, which bill had been received by the Governor and Company of the Bank of England in substitution of the acceptance of *John* and *William Jackson*; but he stated in such affidavit, that *John* and *William Jackson* suspended their payments in the month of June 1815; and that the said bill of exchange, dated the 25th April 1815, did not become due until the 28th of July 1815; and that when the same became due, application was made, on behalf of the Governor and Company of the Bank of England, to the *Jacksons*, for payment; and that the bill, not having been paid, was duly noted for non-payment: that *John* and *William Jackson*, after the suspension of their payments, omitted to renew their acceptances in respect of the sum of 2,500*l.* advanced upon their acceptance; and not having paid their bill of exchange of the 25th of April 1815, so accepted by them, when it became due, application for the payment thereof was made by the Governor and Company of the Bank of England to *Reyner* as drawer, and they agreed to take a bill drawn upon and accepted by *C. T. Thornhill*, and which was accordingly indorsed to the Governor and Company by *Joseph* and *John Corsbie*, in satisfaction and discharge of such said bill of April 25, 1815, accepted

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by *John* and *William Jackson*: that *C. T. Thornhill* had accepted such bill at the instance of and for the benefit of the deponent *Reyner*, and not at the instance of or for the benefit of *John* and *William Jackson*: that *Thornhill*, at the time he paid to the Governor and Company of the Bank of England the said sums, amounting to 1,250*l.* was indebted to the deponent in a much larger sum in respect of his guarantee to indemnify the deponent from the payment of the bills accepted by him.

August 11, 1820.

The petition came on to be heard before His Honour the Vice-Chancellor, who was pleased thereupon to order that the proof of 2,500*l.* should be expunged, and that *Reyner* should refund to the assignees under the commission the respective dividends of 1,750*l.*, 187*l.* 10*s.*, and 312*l.* 10*s.*, amounting to the sum of 2,250*l.*, received by him, and that the assignees should retain their costs out of the estate of *John* and *William Jackson* (*a*).

Against this order *Reyner* appealed.

Mr. *Agar* and Mr. *Montagu*, for the appellant, contended, that the fact of *Reyner* being indemnified did not take away from the *Jacksons'* liability upon their own acceptance. It is admitted, that if *Reyner* had paid the bill when due, he would have had his remedy over against the *Jacksons*. How could his rights be varied by the mode of payment actually adopted? The bill was paid as between the *Jacksons* and the Bank of England — not in cash, indeed, but in what was accepted as tantamount to cash by the Bank, who, but for this payment, might and would have proceeded against the *Jacksons*. The fallacy is in supposing that *Thornhill*, by accepting the bill by which

(*a*) See the judgment reported, 5 *Mad.* 170.

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Reyner paid the Bank, stepped into the *Jacksons'* place, and that they are thereby wholly absolved. *Thornhill* was at the time indebted to *Reyner*, and by the acceptance of that bill discharged so much of his own debt to *Reyner*: it was therefore *Reyner's* own money which went in discharge of the *Jacksons'* acceptance. It had been strongly contended, that this was a case of a principal and surety, and that, by giving time to the principal, *Reyner* had discharged the surety. But to bring this case within the law of principal and surety, the converse of the rule respecting giving time must be maintained — that giving time to the surety discharges the principal. In cases of cross bills, the acceptor is always the principal debtor. This is not the case contemplated in the deed of the 10th of October 1814, of a person "declining, omitting, or ceasing to accept."

Mr. *Hart* and Mr. *Raithby*, *contra*, contended that this was a ceasing to accept within the meaning of the deed. If *Reyner* chose to pay the bill without substituting another name in the place of the *Jacksons*, he himself stood in the place of both, as well with regard to liability upon the renewed bill as to indemnity under the trust deed, under which he had now both his own claim and that of the *Jacksons*. *Reyner*, in his affidavit, states that there was no substitution: but substitution is here not a question of fact, but a conclusion of law; and from the facts before the Court, from the admitted conduct of the parties, such a conclusion must be drawn.

The LORD CHANCELLOR.

This question arises out of a transaction which commenced in the execution of an instrument by Messrs. *Corsbie* and several other persons, in which it is recited that

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that the Bank of England had agreed to advance 40,000*l.* upon the acceptances of the persons therein mentioned, among whom were *Reyner* and the two *Jacksons*. The same kind of transaction took place between these parties as took place between the other drawers and acceptors; that is, *Reyner* drew upon the *Jacksons* for 2,500*l.*, and the *Jacksons* drew upon *Reyner* for 2,500*l.* These were made payable two months after date; and the instrument states that they were, or were intended to be, renewed from time to time for the space of twelve months by the Bank of England, upon the indorsement of these bills, so drawn and so accepted, by *Joseph* and *John Corsbie*. The Bank, indeed, were under no engagement to renew; but, in point of fact, there were renewals from time to time, till the circumstances took place with respect to two renewed acceptances of *Reyner* and the *Jacksons*, which I shall presently state. The *Corsbies*, for whom, with respect to the Bank, all these parties may be considered as sureties, though between themselves each drawer and each acceptor stood in this situation — that when *Reyner* drew upon the *Jacksons* for 2,500*l.*, and the *Jacksons* accepted for 2,500*l.*, the *Jacksons* were primarily debtors by virtue of those acceptances for that 2,500*l.*; and when the *Jacksons* drew upon *Reyner*, *Reyner* was primarily liable, by virtue of his acceptance, for that counter 2,500*l.*, the whole class of drawers and acceptors being sureties for the *Corsbies*, though with this species of suretyship as between themselves — the *Corsbies* assigned certain property to trustees, who were to stand possessed of it upon the following trusts: first, to retain to themselves all costs and expences which should be incurred in the execution of the trust, and all such sum and sums of money as might at any time thereafter become due from them to the different individuals parties to the indenture, including *Reyner* and the *Jacksons*, for

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or by reason of their having respectively so drawn and accepted the said several bills of exchange as aforesaid, and all interest, costs, charges, damages, and expences consequent thereupon, and then to pay over the surplus to the *Corsbies*. There is one part of this instrument which it appears particularly necessary to state, as I think much depends upon it. It does not seem to have occurred at the time this instrument was signed, that the circumstances would happen which afterwards did happen, namely, that the *Jacksons* should become unable to make good the payments which they had undertaken to make good, by virtue of their acceptances; or indeed that any one who was either a drawer or an acceptor should cease to be capable of renewing his paper, by reason of insolvency. That does not appear, from the letter of the instrument, to have been in the contemplation of any of them. The words are, "and it is hereby expressly agreed and declared to be the true intent and meaning of all the said parties thereto, and of the said indenture, that in the event of the death of any of the said parties of the second part, or in case any or either of them shall decline or omit or cease to renew any or either of their acceptances in manner before mentioned, then that the said *William Sims*, &c. (the trustees), or the executors, &c. shall stand possessed of or interested in the said trust property, for the benefit of such person or persons as shall thereupon be substituted and succeed in accepting, drawing, and transacting the same or the like acceptances, in like manner and as fully in all respects as such party so dying or ceasing is or may be entitled or indemnified, under and by virtue of these presents."

Now it must be observed, that the instrument provides for the death of an acceptor, and for his declining,

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omitting, or ceasing to renew his acceptances, but it does not provide for the event of his stopping payment, while the acceptances which he had neither declined nor omitted nor ceased to renew, were running and had not yet become due, but which acceptances he was unable to take up.

According to this part of the instrument, then, substitution is not provided for in the case which has actually happened, and which does not fall within the description of any of the terms used in this clause of the instrument; the case therefore which has actually happened must be provided for by such law as we can apply to it. If the observations which I now make upon this part of the instrument be correct, as I believe they are, the former order of the Court, in which this has been considered as a case of substitution, must be erroneous; and the case must be governed by those rules and principles which apply to mutual drawers and mutual acceptors, where one of those acceptors fails to make good his engagement.

Now the event which happened was, that at a period after the bills had been renewed from time to time, the *Jacksons*, whilst one of their acceptances for 2,500*l.* was in the hands of the Bank of England, stopped payment. The acceptor not being able to pay, of course the Bank had a right to apply against the drawer. The question then is, whether the transactions which afterwards took place amounted to a payment by *Reyner*, for the use of the *Jacksons*, prior to their bankruptcy; and if a payment prior to the bankruptcy, whether it could be proved by *Reyner* under the commission.

Now, I observeagain, that the order which is here complained of, is an order in which this has been con-

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sidered as a mere case of substitution. If, as it appears to me, it is not a case of substitution, but a case in which the person whois bound to relieve Mr. *Reyner* of the bill, has, nevertheless, put Mr. *Reyner* in such circumstances as compelled him to pay that bill; and if he paid that bill before the bankruptcy, then the question arises, not upon what is the intent and meaning of this clause, which does not seem to apply, but what is the law applicable to the case as it now stands. There was a great deal of argument on the doctrine of principal and surety, which, it appears to me, may be laid out of view. I have nothing to do with the fact, except to make a single observation on it — that *Corsbies* were the sureties for all these persons; because the question here is as between *Reyner* and the *Jacksons*, who are sureties, and who are principals in these counter acceptances. *Reyner* is the principal in his acceptances, and the *Jacksons* are the sureties in their drawings; and, on the other hand, the *Jacksons* are the principals in their acceptances, and *Reyner* is the surety with respect to the *Jacksons'* acceptances.

Such being the nature of the case, it appears that *Reyner* had another surety, namely, a gentleman of the name of *Thornhill: Reyner* had prevailed on him to guarantee his dealings with the *Jacksons* in this transaction. At one time it struck me that *Thornhill* was the person to prove; but I have got rid of that impression, because it seems to me, that though *Thornhill* had agreed to indemnify *Reyner*, yet *Thornhill's* agreement to indemnify *Reyner* made it incumbent on *Reyner* to do every thing he could against the acceptors of bills, for the benefit of *Thornhill;* and therefore I am of opinion that all that was said about suretyship, and about the circumstance of *Thornhill's* standing in this relation of indem-

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nifier of *Reyner*, does not apply to prevent *Reyner* from proving under this bankruptcy, if otherwise he had a right to prove; and the result of my opinion therefore is, that if he had otherwise a right to prove under the bankruptcy, no objection can be raised on the ground of that suretyship.

Then comes the question, had he a right to prove under the bankruptcy: now, suppose the matter had stopped entirely there, and that there had been nothing more done, that *Thornhill* had not been brought into the situation in which the *Jacksons* before stood; but suppose that both *Reyner* and *Jackson* had ceased to renew their bills, or to give their paper for the security of the bank; then it appears to me to be reasonably clear, that if such had been the circumstances of the case, if *Reyner* had taken up both bills before the bankruptcy of the *Jacksons*, that he would have paid his own acceptance in discharge of the *Jacksons*; but that on the other hand he would have paid *Jackson*'s acceptances by money handed by him, the drawer; and as the *Jacksons* were, as acceptors, primarily liable, *Reyner* would have had a right to say, I have paid this for you before your bankruptcy, which you ought to have paid before me; it is, therefore, money advanced for your use, and being money advanced for your use before the bankruptcy, I am entitled to prove under the bankruptcy. It is true that *Thornhill*, in one sense of the word, was substituted; that is to say, *Reyner* prevailed upon *Thornhill*, or *Thornhill* rather having been under the original engagement to indemnify *Reyner*, when this bill of *Jackson*'s was dishonoured, the next act of drawing and accepting was between *Reyner* and *Thornhill* and *Thornhill* and *Reyner*; and in that sense he became a substitute; but not a substitute within the intent and meaning of this indenture. The question, therefore, must be

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decided without reference to the indenture, according to the general law between acceptors and drawers when the drawers pay for the acceptors.

There was some little confusion in the evidence with respect to the manner in which this bill was treated. There are two affidavits which state that the bill was a bill treated very differently from those bills where persons did not choose to renew, which is likewise very material.

Now, when the persons did not choose to renew them, the old bills were delivered up cancelled upon the face of them. But this, not being the case of a renewal of bills, seems not to have been considered as a substitution by those who were dealing for the new paper; and accordingly the bill of *Jackson* is delivered up, not as those bills were delivered up when there was a substitution cancelled upon the face of them, but it was delivered up without cancellation; and both the cashiers swear, that such was the habit and usage with respect to all bills, when there was a failure of payment such as that which the *Jacksons* incurred.

There is a difference in the affidavits with respect to the fact of the payment of the notarial charge. One affidavit says, that the notarial charges were paid by the *Corsbies*; and another, that they were paid by Mr. *Reyner*. Now, in my opinion, it makes no difference; because if the *Corsbies* were in circumstances in which they could relieve both *Reyner* and the *Jacksons* from this charge, I do not think their relieving them from these charges can affect the rights of persons to prove in respect of the bill itself. I am therefore finally of opinion, there was a right here to

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prove, and that therefore the order which has been made must be reversed.

The next question is, what is to be proved; now, that depends on circumstances of this nature, as I understand it; that at a particular period, and after the *Jacksons* had stopped payment, the trustees paid over certain sums of money to the Bank of *England*, and the parties gave their acceptances for the residue, or rather so much of the residue as reduced the 2,500*l.* to 1,250*l.* The question, therefore, is this, how far that transaction affects the demand of the whole 2,500*l.*

If the whole 2,500*l.* was paid by *Reyner* before the bankruptcy of the *Jacksons*, then he had a right to prove the whole 2,500*l.* under the bankruptcy of the *Jacksons*; and that new arrangement introduces no other question, as between *Reyner* and the estate of the *Jacksons*, than this, namely, inasmuch as the trustees contributed a certain sum of money in discharge of one moiety of the 2,500*l.*, if the *Jacksons* pay the whole 2,500*l.* then a question may arise, whether the *Jacksons* have a right to call on Mr. *Reyner* to contribute any and what proportion of so much of the trust fund as *Reyner* received, to give the *Jacksons'* estate the benefit of the indemnity in that proportion. Now, that is a difficult question; but it is not a question that in my judgment necessarily arises upon this petition, and I think the order, therefore, that ought to be made here is this, that the former order should be reversed, except so far as it gives the assignees their costs out of the estate; that *Reyner's* proof should stand as at present; and that he should retain these dividends, and receive future dividends; and that this should be without prejudice to any question, if any such question arises and is prosecuted, whether *Jack-*

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son's estate is entitled to call on him for any and what proportion of that sum of money which was paid out of the trust funds.

Ex parte HODGSON and WATSON.—In the matter of TEMPLE.

L. C. LINC. INN. *March* 29, 1825.

The solicitor of a purchaser of an estate from the bankrupt, ordered to attend the commissioners for the purpose of being examined, without prejudice to any question of privilege.

PETITION by the assignees, stating that a commission issued against the bankrupt in 1813, which, after the trial of two issues, was superseded in 1821, and another commission issued: that, before the issuing of the first-mentioned commission, the bankrupt had fraudulently conveyed certain freehold property to one *Kilburn*, who, in the year 1814, fraudulently conveyed the same to one *Benton*: that the petitioners had caused *Benton* to be examined respecting the conveyance of such property; and that, upon such examination, *Benton* stated that he had never seen *Kilburn* until the time when the conveyance was executed; but that his solicitor, Mr. *Withy*, had ascertained the value of the premises, and acted entirely on his behalf, and that the whole transaction had been left to Mr. *Withy*: that Mr. *Withy* had attended before the commissioners pursuant to their summons, but objected to be examined, alledging that he had acted in the matter as the solicitor of *Benton*, and was therefore privileged from answering any questions which might affect his client's security: that the meeting had been adjourned, and at the next meeting Mr. *Withy* had refused to attend. The petition therefore prayed, that he might be ordered to attend before the commissioners, and that he might answer all such questions as to the said

1825.

Ex parte HODGSON. In the matter of TEMPLE.

freehold property, and the conveyance thereof to *Benton*, as the commissioners in their discretion should consider *Benton* would himself have been bound to answer had he acted on his own behalf.

Mr. *Horne* and Mr. *Lloyd*, for the petition, contended, that the privilege of an attorney did not extend to such matters as his client himself would be bound to discover; that if this pretended privilege were allowed, there would be no possibility of overreaching a fraudulent conveyance, so long as the vendee could affect to throw the whole negociation upon the attorney, and thus bar every avenue to a discovery of the real nature of the transaction. The assistance of the Court was necessary in this case for both objects of the prayer, since the commissioners have only power to compel the attendance of those who are charged with being in possession of or indebted to the bankrupt's estate — *ex parte Levett* (*a*), or whose evidence is necessary to prove the trading or act of bankruptcy. (*b*)

Mr. *Sugden* and Mr. *Montagu*, *contra*, submitted, that the Court had no jurisdiction to compel a solicitor to reveal confidential communications, or to disclose evidence which might affect the title of his client.—*Cromack* v. *Heathcote*, 2 *Brod.* & *Bing.* 4.

The VICE-CHANCELLOR.

It is premature to enter into the consideration of Mr. *Withy*'s privilege as attorney to Mr. *Benton*. The

(*a*) *Ante*, vol. i. p. 185.

(*b*) By 6 G. 4. c. 16. s. 33. the commissioners are now empowered to compel the attendance of any person whom they believe capable of giving any information material to the full disclosure of the dealings of the bankrupt.

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Ex parte HODGSON. In the matter of TEMPLE.

question is, whether he shall attend the commissioners, and not what he shall answer upon such attendance.—By the 5 *G.* 2. *c.* 30. *s.* 6. the commissioners have the power to summon any person before them, for the purpose of being examined touching the estate and effects of the bankrupt; and if the person so summoned should attend, but should refuse to answer, or should not answer satisfactorily, the commissioners have then the power to commit him to prison. But if the person so summoned does not attend the commissioners agreeably to the summons, the statute has given them no power to compel his attendance. The 1 *J.* 1. *c.* 15. is the only statute which authorizes the commissioners to commit persons who, being duly summoned, do not attend accordingly; and this statute applies only to persons who are known or suspected to have or detain the goods of the bankrupt, or to be indebted to the bankrupt. Let the order be made, that Mr. *Withy* do attend the commissioners, upon being duly summoned for that purpose.

L. C.
LINC. INN.
January 14, & *Mar.* 11, 1825.

Ex parte SERJEANT.—In the matter of PARKINSON.

Surety in a bond for the bankrupts, after the bankrupts are certificated, joins with them and a new surety in a new bond to the representatives of the creditor, and the old bond is delivered up to the surety: Held, that was not payment by the surety, within Sir S. Romilly's act, so as to enable the surety to prove under the commission.

THIS was an appeal from the decision of his Honor the Vice-Chancellor, reported 1 *Glyn* & *Jam.* 183.

Mr. *Hart* and Mr. *Rose*, for the petition, contended, that this case was, in spirit, within the principle of Sir *Samuel Romilly*'s act. (*a*) It was a legal debt at the time of

(*a*) 49 G. 3. c. 121. s. 8.

1825.

Ex parte SERJEANT. In the matter of PARKINSON.

the bankruptcy; payment, therefore, gave to the surety the same rights which belonged to the original creditor. The payment was substantially made, and the bond kept as a voucher; the original debt was satisfied, and the bankrupt's estate relieved from it: the Court, therefore, will not look at the legal form, but at the evidence of the equitable claim. It has been said this is not payment, only security; but in substance it is as payment. The estate is exonerated, and we who exonerated it must have satisfaction.

Mr. *Roots*, on the other side.

The new bond is received in payment and satisfaction of the debt, and from new parties. The equities, under Sir *S. Romilly*'s act, can only attach to debts and liabilities subsisting at the time of the bankruptcy.

The LORD CHANCELLOR.

Unless this can be brought within the principle of Sir *S. Romilly*'s act, it will be impossible for me to give any relief in this case, and I feel it equally impossible to bring the facts within that principle. The bond is joint and separate. The bankrupts, being certificated, join in the new bond with the petitioner and a new character, now first introduced, as sureties. I must consider this transaction as destroying the old debt and creating a new suretyship, and I think the order of the Vice-Chancellor is right.

The order of the Vice-Chancellor confirmed.

Ex parte WALLIS. — In the matter of WALLIS.

L. C. LINC. INN. *April* 18, 1824.

A COMMISSION of bankruptcy issued against the petitioner in 1810, under which he had been found bankrupt, had passed his last examination, but had not obtained his certificate.

Supersedeas on certificate by surviving commissioner of the names of the creditors who had proved.

Being about to apply for a supersedeas, with the consent of all the creditors who had proved (save one for 20*l.* who was dead insolvent, without being administered to, and whose son was ready to consent), and all the commissioners being dead except one, the present petition prayed that the surviving commissioner might be directed to certify to the Lord Chancellor the names of the persons who had proved; and that the son of the deceased creditor might be allowed to sign a consent to the supersedeas; which was accordingly ordered by the Lord Chancellor,

Mr. *Beames* for the petition.

Mr. *Rose*, for the assignees, did not oppose the application.

Ex parte HARMAN and BROOKS. — In the matter of NIVEN.

LINC. INN. *Dec.* 21, 1824.

ON the 20th of November a docket was struck; upon which, on the 11th of December, a commission was issued. On the 17th of December, before the commission had been proceeded in, an application was made by Mr. *Agar*, *ex parte*, and by motion, that the commission might be

Amendment of Commission.

1824.

Ex parte HARMAN. In the matter of NIVEN.

amended by altering the letter *i* into an *e*, as the bankrupt's name was *Niven*, and *Nivin* was not *idem sonans*. The Lord Chancellor ordered, that upon producing new docket papers such amendment should be made.

On the 20th of December, Messrs. *Harman* and *Brooks* applied with docket papers, which were sent from Manchester, without any notice of what had passed upon Mr. *Agar*'s motion; but in consequence of what had passed, the office declined to receive the docket papers.

Dec. 21. Mr. *Montagu* applied this day, that the docket papers might be received, because Mr. *Agar*'s clients had originally been guilty of laches in not having issued their commission until the 11th of December, and their commission was defective upon their own shewing; and the application ought not to have been by motion, but by petition, as a commission had actually issued; and because the affidavit, upon which their docket was struck, did not state the consideration of the debt.

The LORD CHANCELLOR.

There is no necessity to state the consideration in the affidavit; and if their application were by motion, this is by motion also: and although in strictness a petition is requisite, there are cases where it is desirable to relax this rule. Under all these circumstances I will not for this trifling defect interfere upon this application.

Ex parte PEACOCK, KIRTON, and HANDLEY, Copartners.—In the matter of HUGH BELL, a bankrupt, surviving Partner of WILLIAM THORPE.—*Ex parte* RODING and HANDLEY.—In the same matter.

LINC. INN. *Mar.* 1825. *Nov.* 1825.

Joint creditor, having separate security from one of his co-debtors, admitted to prove his debt against the joint estate, without surrender or sale of his security.

THORPE and *Bell* were, in the month of June 1822, largely indebted to Messrs. *Peacock* and Co., bankers, the petitioners in the first-mentioned petition, in the sum of 5,900*l.* for advances made by them to the bankrupts; and in the said month of June 1822, *Thorpe* and *Bell* executed a bond, dated the 15th of that month, in the penal sum of 12,000*l.*, for securing the said sum of 5,900*l.*, and any sum that might thereafter be advanced by the bankers to them or either of them, but so nevertheless, that such bond should not be a security for more than 6,000*l.*; and for farther securing the said sum of 6,000*l.* and interest thereon, by indentures of lease and release, bearing date the 14th and 15th days of June 1822, *Thorpe* conveyed unto Messrs. *Peacock* and Co. in fee, certain freehold premises, and covenanted to surrender to the use of the said bankers, their heirs and assigns, certain copyhold premises therein described, subject to a proviso for redemption of the said freehold and copyhold premises in the manner therein stated. As an additional security for the monies which should accrue due on the said bond, by indentures of lease and release, bearing date the 24th and 25th days of January 1823, *Thorpe* conveyed to the bankers in fee certain other freehold premises, and covenanted to surrender to them, their heirs and assigns, certain other copyhold premises, upon trust to sell the said last-mentioned freehold and copyhold premises; and out of the monies to arise by such

1825.

Ex parte PEACOCK and others. In the matter of BELL.

sale, to pay what should be due to them, Messrs. *Peacock* and Co., and the residue to *Thorpe* absolutely. On the 27th of February 1823, *Thorpe* died, and on or about the same day this commission issued against *Bell*, as surviving partner of *Thorpe*, and at the date of the commission, *Bell*, as such surviving partner, was indebted to Messrs. *Peacock* and Co. in the sum of 6,000*l.* The commissioners having rejected the proof of *Peacock* and Co. against the joint estate of *Thorpe* and *Bell*, on the principle that no proof could be admitted whilst they retained the securities on *Thorpe*'s estate, the first petition was presented, praying that they, Messrs. *Peacock* and Co., might be admitted to prove against the joint estate the said debt of 6,000*l.* secured by the said joint bond.

Mar. 1825. Mr. *Roupell*, for the assignees, contended, that the petitioners ought to deliver up their securities, or have them sold, before the proof could be admitted; that it was not like the case of security from a stranger; that here the joint creditors had an interest in the separate estate; and that *ex parte Parr* (*a*) related to bills, to which a distinct rule of exception applied.

Mr. *Horne* and Mr. *Montagu* said, that the principle, that you shall not prove against an estate, and at the same time retain security against the same estate, — that you shall not take the whole of part, and part of the whole, for the same debt, was totally inapplicable to the present case.

The Vice-Chancellor was of opinion, that the petitioners were entitled to prove against the joint estate, without giving up their securities on the separate estate of the deceased partner; and it was ordered accordingly.

(*a*) 1 *Rose*, 76.

Nov. 1825.

Ex parte PEACOCK and others. In the matter of BELL.

The assignees presented a petition of appeal against the order of the Vice-Chancellor.

Mr. *Shadwell* and Mr. *Roupell* for the appellants.

Mr. *Horne* and Mr. *Montagu* for the assignees.

The LORD CHANCELLOR.

The joint estate is primarily liable. The separate estate can only be considered as surety for the joint estate. I think the order of the Vice-Chancellor is clearly right.

The order of the Vice-Chancellor was confirmed, and the petition of appeal dismissed, with costs.

L. C. LINC. INN. *March* 25, 1825.

Ex parte WEBB. — In the matter of BURRASTON.

The state of the money market is not a circumstance which can affect the rule in bankruptcy as to the value of an annuity.

BY indenture of the 12th of August 1822, *Burraston* and *Reaston*, in consideration of 2,000*l.* granted to *Webb*, the petitioner, an annuity during the life of a third person therein named, and secured upon certain premises therein described, of which *Burraston* and *Reaston* were tenants in common in fee. In May 1823, *Reaston* died insolvent; and in October in the same year this commission issued against *Burraston*: at the date of the commission, there was due for arrears of the annuity the sum of 172*l.* 10*s.* The petitioner applied to the commissioners for an order for sale of the bankrupt's interest

1825.

Ex parte WEBB. In the matter of BURRASTON.

in the premises on which the annuity was secured; but the commissioners refused to make any order, or to admit any proof, without the direction of the Court. The petitioner by his petition further stated, that he had been advised that the present value of the annuity, independent of the arrears thereof, was 3,909*l.* 15*s.*; and he therefore prayed, that *Burraston*'s share in the premises upon which the annuity was secured might be sold; and that out of the purchase money, after discharging the expences of the sale, the said arrears of 172*l.* 10*s.* might be paid; and that the remainder thereof might be paid to the petitioner in discharge of the said sum of 3,909*l.* 15*s.*, or such other sum as the Court should be of opinion was the real value of the annuity, as far as the same would extend; and if it should be insufficient, then that the petitioner might be at liberty to prove for the deficiency.

Mr. *Roots*, for the petitioner.

The sum to be proved is the value of the annuity; and in ascertaining that value, all circumstances which would affect the value are to be taken into consideration. No circumstance is more important in estimating the value of an annuity than the change in the value of money. A depreciation of money has taken place since the grant of the present annuity; and it would be highly injurious to the grantee to allow him to prove for a proportionate number of pounds only, when those pounds are the same only in denomination, and not in value. All the cases warrant such a course of estimation: *ex parte Thistlewood* (*c*) establishes that improvement in the health of the annuitant is a circumstance to be taken

(*c*) 1 *Rose*, 290.

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Ex parte WEBB, In the matter of BURRASTON.

into account; and *ex parte Whitehead* (*d.*), that all special circumstances are to be considered, though the decision was against the increased valuation, because, upon the facts before the Court, there were in that case no such special circumstances. It is the constant practice of actuaries, in valuing annuities for sale, to take into account the variation in the price of money, as well as change in health and lapse of years.

Mr. *Montagu, contra*, relied upon *ex parte Whitehead*. Unless under special circumstances, as in *ex parte Thistlewood*, the practice has always been to prove for the sum paid, deducting the diminished value from lapse of time. The law does not recognize the stock-brokers distinctions between a pound this month and a pound the next, nor will it encourage the endless subtleties and refinements to which such a practice would give rise. As well might a creditor for a loan insist upon receiving a greater number of pounds in repayment, because at the time the money was lent each pound bore a higher interest than at the day of payment.

The VICE-CHANCELLOR.

The value to be claimed under the bankruptcy is the original price, with a proportionable deduction in respect of the time since elapsed. The special circumstances referred to by Lord *Eldon* in *ex parte Whitehead*, are such circumstances as existed in the case *ex parte Thistlewood*, where, at the time of the grant, the grantee was in such a state of health that his life was not insurable, and the price was calculated accordingly. The state of the

(*d*) 1 *Meriv.* 127, 2 *Rose*, 358.

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Ex parte WEBB. In the matter of BURRASTON.

money market is not a circumstance which can affect this rule in bankruptcy.

It was ordered, that it be referred to the commissioners to inquire and ascertain, whether the said petitioner had a valid security upon the said hereditaments and premises in the said petition mentioned, in respect of the said annuity of 247*l.* 10*s.*; and if the said commissioners should find that the said petitioner had a valid security charged upon the said premises in respect of the said annuity, then it was ordered, that the said commissioners do ascertain the value of the said annuity of 247*l.* 10*s.* at the date of the said commission of bankrupt, considering the original price paid by the said petitioner for the purchase of the said annuity as the value thereof at the time the same was granted, and considering the same as diminished in value at the time of the date of the said commission, by reason that part of the time for which it was granted had elapsed since the grant of the said annuity, and considering also the time which had elapsed between the last day on which the said annuity was payable, and the date of the said commission; and the said commissioners were also to take an account of the arrears of the said annuity (if any), which became due up to the last day before the date of the said commission on which the same was payable, and remaining unpaid at the date thereof; and, for the better making the said inquiry, and taking the said account, it was ordered, that all proper parties be severally examined before the said commissioners, upon interrogatories or otherwise, touching the matters in question, as the said commissioners should think fit, and produce before them upon oath all deeds, books, papers, and writings in their or either of their custody or power relating thereto, as the said commissioners should direct.

1825.

Ex parte WEBB. In the matter of BURBASTON.

And it was further ordered, that the said hereditaments and premises be sold before the said commissioners, of which due notice was to be given and published in the *London Gazette*, and such other of the public papers as they should think fit, when and where the said premises were to be sold before them, or by public auction at any other place or places, if they should so think fit, and that such sale be made accordingly, and be conducted by the assignees under the said commission; and it was ordered that all proper parties do join in such sale, and in the conveyance or conveyances of the said hereditaments and premises to the purchaser or purchasers thereof, as the said commissioners should direct; and that the monies which should arise from such sale (after deduction and payment thereout of the costs and charges of and relating to the said sale, and of and occasioned by this application, such costs being first settled by the said commissioners, if the parties differ about the same) be applied in payment to the said petitioner of what should be found to be the value of the said annuity, and the amount of the arrears thereof (if any), and the surplus of the said monies (if any), be paid over to the said assignees; but in case the monies which should arise from sale (subject in the first place as aforesaid) should not be sufficient to pay the said petitioner the value of the said annuity as aforesaid, and the said arrears thereof (if any), then it was ordered that the said petitioner be at liberty to prove such deficiency under the said commission, and be paid a dividend or dividends thereon, rateably and in equal proportion with the rest of the creditors of the said bankrupt seeking relief under the said commission.

1825.

LINC. INN. *March* 25, 1825.

Ex parte PALMER. — In the matter of FUNSTON.

Bill of costs up to the choice, which had been taxed by the commissioners at 97*l.* 10*s.*, ordered to be taxed by the Master, on the ground that the commissioners had excluded the parties from attending the taxation.

THIS was a petition, by the assignees of the bankrupt, for a re-taxation of the solicitor's bill of costs up to the choice of assignees, which had been taxed by the commissioners at 97*l.* 9*s.* The petition stated that there were many gross and extravagant charges in the bill, and that the petitioners had no opportunity of objecting to the allowance of any items, inasmuch as the commissioners excluded the petitioners and their solicitor from being present at the taxation, alleging it to be their constant practice to examine and tax such bill in the absence of the parties on both sides.

Mr. *Horne* and Mr. *Rose* for the petitioners.

Mr. *Wakefield* for the solicitor.

The VICE-CHANCELLOR said, he should make the order for the taxation, on the single ground that the commissioners had excluded the parties from attending the taxation. It was ordered accordingly that the bill of costs should be referred to one of the Masters of the Court for taxation, with the usual directions.

1825.

Ex parte CARLING. — In the Matter of CARLING.

LINC. INN. *May* 16, 1825.

Commission under the circumstances superseded, on a petition for that purpose signed by the solicitors of the bankrupt, and all the creditors who had proved, and upon the certificate of such signature by the commissioners, the bankrupt being abroad, and not having surrendered.

PREVIOUSLY to the year 1816 *Carling* left England for America in a state of insolvency. In September 1816 a commission of bankruptcy was issued against him by his partners, *Addington* and *Cobbett*, and assignees were chosen, to whom an assignment of his effects was made. In 1824, the bankrupt being still abroad, and avowing his intention of not returning to England, made an offer of 15*s.* in the pound to his creditors, upon the commission being superseded. This offer was accepted, and a petition for superseding the commission, signed by all the creditors, was prepared; but as the bankrupt had not surrendered, and his signature could not be obtained, an application was made to the Lord Chancellor, by Mr. *Montagu*, that the surrender might be dispensed with, and that Messrs. *Amory* and *Coles*, the bankrupt's solicitors, might sign the petition, they being authorized by the bankrupt's agents in this country so to do.

The LORD CHANCELLOR observed, that as a commission of bankruptcy was merely a civil process, he saw no reason for refusing the present application, and directed that the certificate of the commissioners, of all the creditors having signed, should be procured.

The petition, signed by Messrs. *Amory* and *Coles*, and the several creditors of the bankrupts, together with the certificate of the commissioners, being produced to the Lord Chancellor, he was pleased to order the supersedeas. *May* 16.

1825.

V. C. LINC. INN. *June* 17, 1825.

Ex parte HOUSTON, and *ex parte* BOYD. — In the matter of BOYD, BENFIELD, and Co.

A surety paying after the bankruptcy to a creditor who has proved, can only stand in his place upon the bankrupt's estate, and in case of a surplus, can claim no interest which the creditor could not have claimed.

THE petition of *Robert Houston*, the surviving partner of the firm of *Alexander Houston* and Co., stated, that there had been very large dealings between that firm and the house of *Boyd, Benfield*, and Co.: that in March 1800, *Boyd, Benfield*, and Co. were declared bankrupts, and in 1821 a renewed commission issued against them: that the petitioner attended to prove what was due upon the balance of accounts from the said bankrupts, when he was admitted to prove the sum of 5,967*l.*, being the amount of the principal claimed, and had also offered at the same time to prove the sum of 29*l.* 6*s.* 3*d.*, being the amount of interest due upon such debt down to the date of the commission, and claimed to be allowed the interest accrued thereon subsequent to the commission, as there was a surplus more than sufficient for that purpose: that the commissioners rejected the proof of any interest, on the ground, as the petitioner understood, that no account had been, previous to the bankruptcy, rendered by *Alexander Houston* and Co., charging interest on their advances to the house of *Boyd, Benfield*, and Co., or upon balances due from *Boyd, Benfield*, and Co. to *Alexander Houston* and Co.; but the petitioner stated, that interest upon advances and payments had always been charged and allowed on both sides, and that the reason why no account had been actually rendered to *Boyd, Benfield*, and Co., charging them interest upon any balances, was, because until within a short time previous to their bankruptcy the balances of the accounts current,

1825.

Ex parte HOUSTON and BOYD. In the matter of BOYD and others.

including also therein the balances of the interest account, were in favour of *Boyd, Benfield*, and Co., and their bankruptcy took place before such account, which was then in favour of *Houston* and Co., could be rendered. The petition therefore prayed that the proof of 29*l.* 6*s.* 8*d.*, the interest upon the sum of 5,967*l.* up to the commission, and of the interest upon such sum accrued since the date of the commission, might be allowed.

July 12, 1822.

This petition came on to be heard before His Honour the Vice-Chancellor, who thereupon ordered that it should be referred to Mr. *Cooke*, to inquire and state whether, by the course of dealing between the firms of *Alexander Houston*, and *Boyd, Benfield*, and Co., the firm of *Alexander Houston* and Co. were entitled to claim any and what interest on the said sum of 5,967*l.* so proved under the commission.

In pursuance of this order, Mr. *Cooke*, by his report, stated, that it appeared to have been the habit of the said *Boyd, Benfield*, and Co. to deliver, half-yearly, to *Alexander Houston* and Co., accounts current of their dealings and transactions, which accounts current did not in themselves contain any column of interest: that such half-yearly accounts were accompanied by separate calculations of interest: that the mode of calculating interest in such interest accounts was not by directly calculating interest on payments and receipts on both sides, but by calculating interest on payments by *Boyd, Benfield*, and Co. only, who were always in advance, and deducting sums when received from or on account of *Alexander Houston* and Co., and then and there calculating interest on such reduced sum, which appeared to have been the invariable course: that, in fact, the balance was always

1825.

Ex parte Houston and Boyd. In the matter of Boyd and others.

in favour of *Boyd, Benfield,* and Co. up to the date of their bankruptcy, but that the balance was apparently turned at the time of the bankruptcy in favour of *Alexander Houston* and Co., by reason of their taking credit in account for certain bills to the amount of 38,000*l.*, drawn by *Walter Boyd* jun. upon and accepted by *Boyd, Benfield,* and Co., and indorsed by *Alexander Houston* and Co., and so indorsed, re-delivered to *Boyd, Benfield,* and Co., and by them negociated, which said bills were all due and payable prior to the time of the bankruptcy, and part thereof, to the amount of 15,500*l.*, were at that time in the hands of *bonâ fide* holders, and were proved under the commission against *Boyd, Benfield,* and Co., and which bills, to the amount of 15,500*l.*, ought not to have been carried to the credit of *Alexander Houston* and Co. until they were actually paid by them after the bankruptcy; and that, by the course of dealings between the two firms, *Alexander Houston* and Co. were not entitled to claim interest from *Boyd, Benfield,* and Co. on the said sum of 5,967*l.*

July 19, 1824.

A petition was presented by the petitioner *Houston,* excepting to the report, and praying that the same might not be confirmed; upon the hearing of which His Honour the Vice Chancellor was pleased to order, that it should be referred back to Mr. *Cooke,* to inquire and certify whether the said sum of 5,967*l.*, the balance proved under the commission, was to any and what extent created by payment, after the bankruptcy of *Boyd, Benfield,* and Co., of bills of exchange to which *Houston* and Co. had, previously to the bankruptcy, put their names as indorsers; and whether any of those bills which created the proof of the said balance had been previously

1825.

Ex parte HOUSTON and BOYD. In the matter of BOYD and others. *July* 27, 1824.

proved under the commission by the prior holders to whom they had been paid; and to state specially any circumstances attending such proof, as either party might request.

Mr. *Cooke*, by his report, certified, that the said sum of 5,967*l.* was wholly created by payments after the bankruptcy of the bills in his report mentioned, and amounting to the sum of 15,500*l.*, and that each of those bills had been exhibited under the commission, either as having been documents constituting the debts proved, or securities for the debts proved, but in which of those characters could not then be ascertained, by reason of the proceedings containing such proofs having been lost; and that no evidence was offered to show that the several persons who had proved upon or exhibited such bills were creditors of *Boyd, Benfield*, and Co., otherwise than as holders of the said bills; but that, on the contrary, it was proved that the several holders thereof were not creditors of *Boyd, Benfield*, and Co. in respect of any accounts or dealings and transactions with the said firm, otherwise than as being respectively holders of the said bills. The report also contained a statement of the mode in which these bills, together with interest from the time they became due, and expences thereon, were paid by Messrs. *Houston* to the holders.

Mr. *Rose* and Mr. *Cullen*, in support of the claims of the petitioner *Houston*.

The debt due from the bankrupt to the creditor holding the bills was, considered with reference to the proof, for the principal sum only; but, considered with reference to the nature of the engagement between the bankrupt and his surety, the debt of the bankrupt was for the whole of that sum which the surety was liable to pay in

1825.

Ex parte HOUSTON and BOYD. In the matter of BOYD and others.

respect of his engagement for the bankrupt. *Ex parte Martin*, 2 *Rose*, 87. This claim is not only consistent with the equitable construction of the 8th section of statute 49 *G.* 3., but according to the real justice and the intention of the law; for it is provided that the surety, if the creditor has not proved, shall prove for the payment he has made in respect of the debt of the bankrupt. The debt of the bankrupt, as between the surety and the bankrupt, is the debt which the surety is liable to pay; and being liable to pay not only the principal sum which the bill holder might have proved, but also, in respect of his own solvency, the interest which subsequently accrued due, the Court is bound by the words of the statute to hold that Messrs. *Houston* have paid a debt of the bankrupt, consisting of principal and interest, and are entitled to prove in respect of such payment. This clearly would be the case if the creditors had not proved; but could it be the intention of the legislature in this statute to make a difference as to the right of a surety, where a proof has been made by the holder of the bill, and where no proof has been made. It is clear that *Boyd* and Co. would have been liable for interest upon their dishonoured bills had no bankruptcy taken place; and now, after the supersedeas on condition of paying their debts in full, and a surplus remaining, they must be considered, in relation to their sureties, as solvent persons within the principle of *ex parte Rooke*, 1 *Ath.* 244.; they now stand as if no commission had intervened. This principle is confirmed by *ex parte Mills*, 2 *Ves.* 295., and *ex parte Pring*, therein cited, that the Court will exercise a more liberal jurisdiction in the allowing of interest where there is a surplus, than it would where there was not. Had *Houston's* proof never been upon the proceedings, and the commission had been superseded, all his legal rights would

1825.

Ex parte HOUSTON and BOYD. In the matter of BOYD and others.

have revived; and by the supersedeas no proof or proceedings exist.

Mr. *Fonblanque*, Mr. *Horne*, and Mr. *Montagu*, against the claim, contended, that the statute would not bear the forced construction which had been put upon it. An attempt of the very same kind had been made, against which the Court decided, in *ex parte Wilson* (*a*), where a proof for interest subsequently accrued had been admitted by country commissioners, and the Lord Chancellor ordered it to be expunged, and observed, that all that was meant by the act was, that the surety should prove as the principal creditor, but nothing subsequent to the bankruptcy. The only case which can be presumed to support such an application is *ex parte Martin*. (*b*) Even there, so little was the Lord Chancellor satisfied with the decision, that he intimated his willingness to re-hear the petition. A petition of re-hearing was presented, which, from the smallness of the sum in dispute, and the probable lapse of time before judgment could be obtained, was compromised. The case of *ex parte Wilson* is the only reported case that strictly applies, and that has regulated the decisions of the Court and commissioners ever since. The fact of a supersedeas does not affect the question, which must be determined as though there were no supersedeas. *Ex parte Williams*, 1 *Rose*, 401. The supersedeas cannot be granted until all the demands which can be maintained under the commission are satisfied, and all matters between the bankrupt and his creditors finally settled. In no case has the Court dealt differently with the question of interest, on the ground of a supersedeas.

(*a*) 1 *Rose*, 137. (*b*) 2 *Rose*, 87.

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In this case Mr. *Cooke* reported that all these bills, the subject of the proof, had been proved under the commission by the actual holders, and that the demand of 5,967*l.*, which the petitioner had been permitted to prove, was not upon any balance arising in the course of their dealings, but was the amount of bills which he had paid since the bankruptcy, after deducting the balance due in the course of their dealings. It does not, however, follow, because this is a payment not in the course of their dealing, that therefore the petitioner is not entitled to interest. The real nature of the payments was this — *Houston* and Co. were sureties upon these bills for *Boyd, Benfield,* and Co., who, being the drawers and acceptors, would, in the course of dealing, have taken them up: this, then, was a payment by the sureties after the bankruptcy of the principals; and the question is — whether a surety, paying after the bankruptcy, is or is not to take the same measure of benefit under the commission against the principal which the party in whose place he stands in respect of the prior proof under the commission would have taken; — whether, although the party who proved these bills under the commission could never have received more than the principal debt, yet *Houston* and Co. paying them after the bankruptcy, shall not only receive under the commission that principal which the creditor proving would have received, but also interest upon those bills; Before Sir *Samuel Romilly's* act no person could prove under a commission in respect of a payment made after the bankruptcy. If the party who was surety for the bankrupt was afterwards called upon to pay the debt, unless the creditor who called on him for payment had already proved, he was obliged to have recourse to a

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Court of Equity in order to suspend any execution against himself in respect of the debt, and to compel the creditor who held the security to prove under the commission. The object of that clause of Sir *Samuel Romilly's* act, which enables a surety to prove, was to avoid the necessity of filing a bill: it provides, that if the creditor have already proved, the surety paying the debt shall stand in his place; and if not, then that the surety himself shall be at liberty to prove in respect of the payment made by him. Now this is a payment by Messrs. *Houston* and Co., as sureties, after the commission: it is a payment in a case where the creditor had proved under the commission before such payment by *Houston* and Co.; and the language of the act is, that if the creditor shall have proved his debt under the commission, the surety shall stand in the place of the creditor as to the dividends upon such proof. The words of the act are direct — that the only benefit he shall be entitled to is the dividend which the creditor would himself have received. Interest is claimable in case of a surplus only in respect of some contract, expressed or implied; and the law on this subject has been well settled in the case of *ex parte Boyd.* (*a*)

(*a*) 1 *Glyn & J.*, 285.

V. C.
LINC. INN.
March 24,
1825.

Ex parte SIMONDS and others. — In the matter of MARSH, DEAN, and Co.

No objection to an affidavit, that it was not headed in the matter of the bankruptcy in which it was used, if from the accompanying circumstances it is manifest that it was judicially used in the bankruptcy.

THIS petition, by several creditors of the bankrupts, sought to avoid the election of *John Hooper* and *John Weedon* as assignees, on the ground that it had been carried by votes given by virtue of powers of attorney which were verified by affidavits not entitled in the bankruptcy; and it prayed that it might be declared, that such of the affidavits as were not entitled in the bankruptcy ought to have been rejected by the commissioners; and that *James Fuller*, whom the major part in value of the competent creditors had chosen as assignee, if the unentitled affidavits and powers of attorney were rejected, might be declared to have been duly elected assignee, or that the choice of *Hooper* and *Weedon* as assignees might be declared void, and a new choice directed.

The affidavits of the due execution of the powers of attorney were annexed to the powers, and were signed by one commissioner as having been exhibited under the commission against the bankrupts.

Mr. *Hart* and Mr. *Montagu*, for the petition.

These affidavits could not be the subject of indictment for perjury, as they do not shew on the face of them that they have been made in any judicial proceedings. They may be perfectly voluntary, as far as the contents of them manifest. The subsequent exhibit, signed by the commissioner, cannot operate to make that perjury which was not so before. *Rex* v. *Jones*, *Strange*, 704;

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Rex v. *Pierson*, *Andr.* 313; *Bevan* v. *Bevan*, 3 T. R. 601; *Rex* v. *Harrison*, 6 T. R. 60; statute 3 *G.* 4. *c.* 81. *s.* 6. (*a*)

Mr. *Rose* and Mr. *Wakefield*, for the assignees.

The Court will not avoid the choice on account of the mistaken judgment of the commissioners, if they have erred: but the affidavits are sufficient: the powers of attorney shew in their contents that they are to be used in the particular bankruptcy; and the affidavits are annexed, and refer to the powers. In Mr. *Montagu's* Collection of Precedents, 2 M. B. Law, 226, the affidavits are not entitled.

The VICE CHANCELLOR.

March 24, 1825.

It is true that perjury cannot be assigned upon the affidavits, unless they appear to have been made in the course of a judicial proceeding. The powers of attorney, being annexed to the affidavits, manifest by their contents that the affidavits were made for the purpose of proving the debt under the commission; and the signature of the commissioner, that they were exhibited before the commissioners, shews that the affidavit was used for the purpose of such proof. I am of opinion, therefore, that the objection is not well founded. Petition dismissed with costs.

Against this judgment of His Honour the Vice-Chancellor, the petitioners appealed, and the appeal was argued before the Lord Chancellor on the 15th of August 1825.

(*a*) 6 *G.* 4. *c.* 16. *s.* 99. is the corresponding section in the new Bankrupt Statute.

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Ex parte SIMONDS. In the matter of MARSH.

The LORD CHANCELLOR.

I am much mistaken if, upon looking into judicial proceedings, we do not find that there are many cases in which the particular purpose for which instruments are made is shewn by reference in their contents, and not by their title. I have no doubt that perjury might be assigned upon these affidavits. It would not, I apprehend, be necessary, in order to prove that they were made in a judicial matter, to show that it was so stated on the face of them, if it plainly so appeared from other circumstances connected with them. The powers to vote state the commission, and the affidavits expressly refer to the powers: I do not decide it on the exhibits. The order of the Vice-Chancellor confirmed. Petition of appeal dismissed with costs.

V. C. *August* 9, 1825.

Ex parte ROSS and HOOPER. — In the matter of COLES, a bankrupt.

After a commission issued, the Statute of Limitations does not run against a creditor of the bankrupt.

THIS petition, by the assignees of *Turnbull, Forbes*, and Co., prayed that they might be admitted to prove two promissory notes, both dated the 21st of May 1810, payable three and four months after date, under this commission, which issued the 10th of July 1810. Upon an application by the petitioners, in December 1824, to prove these notes, the commissioners had rejected the proof, on the sole ground that more than six years had elapsed since the issuing of the commission, and since the said notes became due.

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Ex parte Ross. In the matter of Coles.

Mr. *Rose* for the petition.

Mr. *Montagu*, for the assignees, cited *ex parte Dewdney*, 15 *Ves.*; *ex parte Roffey*, 19 *Ves.* 463.

The Vice Chancellor said, that after a commission issued, the Statute of Limitations did not run against a creditor; that the commission was a trust for the benefit of all the creditors, and it was a known principle that the statute did not run against a trust; and it was ordered that it be referred back to the commissioners to receive the said proof in respect of the said two promissory notes, having regard to the said declaration, and that the petitioners do tender their proof accordingly.

Ex parte PETTIT. — In the matter of PETER HOUGHTON and SAM. PET. HOUGHTON.

V. C. Linc. Inn. *August* 11, 1825.

On this petition of a mortgagee of the lands of *Peter Houghton*, it appeared, that in April 1821 the petitioner lent to *Peter Houghton* the sum of 1,200*l.*; and that *Peter Houghton*, being at that time tenant in tail of the hereditaments comprised in the mortgage deed afterwards executed, in order to secure the repayment of the said sum of 1,200*l.* and interest, in the same month of April deposited the title deeds relating to these here-

Petitioner being an equitable mortgagee of lands of the bankrupt, Peter Houghton, for the sum of 1,200l., advances to him the further sum of 1,350l., and takes a warrant of attorney to secure the last-mentioned sum; afterwards the bankrupt executes to the petitioner a conveyance of the lands, in trust to sell, and after payment of the 1,200l. and interest, to pay the surplus to the bankrupt; and on the day on which the conveyance is executed, judgment is entered up and execution levied under the warrant of attorney for the 1,350l., and part of that sum is satisfied by the levy: Held, that the petitioner was not entitled to tack the residue of the judgment debt to the mortgage.

1825.

Ex parte PETTIT. In the matter of HOUGHTON.

ditaments with the petitioner; and *Samuel Peter Houghton*, the son of *Peter Houghton*, wrote to the petitioner a letter, in which they undertook to make a mortgage of the same hereditaments to the petitioner, for securing to her the said 1,200*l.* and interest: that on the 27th of February 1822 the petitioner lent *Peter Houghton* the further sum of 1,350*l.*, and that he thereupon executed a warrant of attorney to confess judgment for the sum of 2,700*l.*, with a defeazance, stating that the same was given for securing the 1,350*l.* and interest: that in November 1824 there was due to the petitioner from the said *Peter Houghton*, besides the said sums of 1,350*l.* and 1,200*l.*, the sum of 35*l.* for interest on the last-mentioned sum: that by indentures of lease and release, bearing date respectively the 12th and 13th of November 1824, the release being made between *Peter Houghton* and *Ann* his wife of the first part, the petitioner of the second part, *Joseph Warner Bromley* of the third part, and *William Bromley* of the fourth part, and by a common recovery suffered on the said 13th of November 1824, in which the said *Peter Houghton* and *Ann* his wife were vouchees, all and singular the messuage and hereditaments whatsoever, situate at Clifforth, in the parish of Bramham, in the county of York, and on the precincts and territories thereof, and which were comprised in a certain indenture of settlement in the said indenture of lease and release recited, and all other the lands, tenements, and hereditaments which were subject to the uses of the said indenture of settlement, and all other the hereditaments whatsoever of him the said *Peter Houghton*, in the said parish of Bramham, with the appurtenances, were conveyed and assured to the use of the petitioner, her heirs and assigns, for ever; and it was thereby declared that the petitioner, her heirs and assigns, should stand and be seised of the same hereditaments, upon trust that she and they should, immediately after the

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Ex parte PETIT. In the matter of HOUGHTON.

execution of the now stated indenture, or when and as they should think fit, and either with or without the consent of the said *Peter Houghton*, his heirs or assigns, make sale of the same hereditaments; and it was declared that such sales and assurances as should be made by the petitioner of the said mortaged premises should be good and effectual, although the said *Peter Houghton*, his heirs or assigns, or other the persons entitled to the equity of redemption thereof, should not concur therein; and it was declared that the petitioner, her executors, administrators, or assigns, should stand possessed of the sums of money to arise by any such sale, upon trust, in the first place, to retain and discharge the said sums of 1,200*l.* and 35*l.*, and such interest as should be due on the said sum of 1,200*l.*, and all costs and charges and expences attending the execution of the said trusts, and to pay the surplus (if any) of the said purchase money to the said *Peter Houghton*, his executors, administrators, and assigns; that the said indentures of lease and release were duly registered in the West Riding of Yorkshire; that, on the said 13th of November 1824, judgment was entered upon the said warrant of attorney, which judgment was duly docketed, and was also duly registered in the West Riding of Yorkshire; that, on the said 13th of November 1824, a writ of *fieri facias* was issued upon the said judgment, directed to the sheriffs of London, who thereupon seized the separate property of the said *Peter Houghton*, but the same produced, after payment of 11*l.* 5*s.*, the sheriff's poundage, no more than the sum of 338*l.* 15*s.*, which had been duly paid to the petitioner; that the costs of entering up the said judgment and of the said writ of *fieri facias* were 4*l.* 19*s.*, which being added to the said sum of 1,350*l.*, made the sum of 1,354*l.* 19*s.*, and the said sum of 338*l.* 15*s.* being deducted therefrom, left due to the petitioner the sum of

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Ex parte PETIT. In the matter of HOUGHTON.

1,016*l.* 4*s.*; that a commission of bankrupt, bearing date the 20th day of November 1824, was awarded and issued against the said *Peter Houghton* and *Samuel Peter Houghton*, and they were thereupon duly found to be bankrupts upon an act of bankruptcy committed on the 19th day of the same month of November.

The petitioner claimed a lien on the mortgaged premises for the said sum of 1,016*l.* 4*s.* due on the judgment, and prayed a declaration that the premises were a security not only for the 1,200*l.* and interest, and 35*l.*, but also for the 1,016*l.* 4*s.* and interest; and that the mortgaged premises might be sold, and an account taken of what was due in respect of the 1,200*l.* and 1,016*l.* 4*s.* and interest; and that the money to arise by the sale might be applied in payment of what should be found due on that account, and the petitioner be admitted to prove for the residue.

Mr. *Pemberton* and Mr. *Andrews*, for the petitioner, argued that the question must be considered in the same manner as if it arose on a bill by the assignees to redeem, and that on such bill the Court could not have compelled the petitioner to give up the premises on payment of one debt, leaving her to proceed at law for the other debt; that the petitioner having at last clothed herself with the legal estate, it must be treated as having relation to the equitable lien, as being in completion of the prior equitable title, and the case would then be within the ordinary principle. *Baker* v. *Harris*, 16 *Ves.* 397. *Pope* v. *Onslow*, 2 *Vern.* 286.

Mr. *Hart* and Mr. *Montagu*, for the assignees, resisted the application to tack the judgment debt to the mortgage, on the ground that the circumstances negatived

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Ex parte PETIT. In the matter of HOUGHTON.

any inference of intention to include the judgment debt in the security; that it was not an ordinary mortgage, but a conveyance to the creditor in trust to sell and pay over the surplus to the debtor, and this conveyance executed at the same moment that judgment was entered up for the other debt, demonstrating an intention to resort to the mortgage security only as to the debt uncovered by the judgment; and that the equitable mortgage was at an end by the execution of the conveyance.

The VICE-CHANCELLOR.

The claimant in this case, having an equitable mortgage by deposit of title deeds, converts herself, not into a legal mortgagee, but into another character, that of trustee for sale, with a direction to pay the surplus to the debtor, and a separate instrument is executed to secure the other debt, on which judgment is entered and execution actually levied. The right of tacking depends on the principle of avoiding circuity of action; but in the circumstances of this case, no circuity of action would have reached the surplus, and the principle is inapplicable; and I am of opinion the petitioner is not entitled to a lien in respect of the residue of the judgment debt.

By the order, it was declared, that the said petitioner was not entitled to a lien on the mortgaged premises in respect of the said sum of 1,016*l.* 4*s.*; and in the usual manner a reference was made to the commissioners, to take an account of the principal, interest, and costs due under the indenture of mortgage; and a sale of the premises, under the conduct of the assignees, and the application of the proceeds, were ordered, with liberty for the petitioner to prove for the balance, in case the mortgaged premises should be insufficient to pay what should be found due to her.

V. C.
LINC. INN.
August 12,
1825.

Where a commission is superseded by an arrangement between the bankrupt and his creditors, and the bankrupt pays the solicitor's bill of costs without taxation, the Court will afterwards order them to be taxed.

Ex parte HEYDEN. — In the matter of HEYDEN.

THIS Commission issued in April 1824: *Heyden* was adjudged bankrupt, and assignees were duly chosen. In July 1824, an arrangement was made between the bankrupt and his creditors, for a composition on their debts, and the superseding of the commission, and it was part of such arrangement that the bankrupt should pay the solicitor's bill of costs prior and subsequent to the choice of assignees. This arrangement was carried into effect, and the commission superseded. The bankrupt paid the bill of costs delivered by the solicitor, but the same had not been taxed. This was a petition by the bankrupt, praying that the bills of costs of the solicitor might be taxed, and that the solicitor might be ordered to repay to the petitioner what, upon taxation, he should be found to have been overpaid, and to deliver up to the petitioner his papers and writings.

Mr. *Rose* and Mr. *Glyn*, for the petition.

Mr. *Roupel* for the solicitor.

The VICE-CHANCELLOR.

The bankrupt presents this petition for the taxation of these bills, stating, that he has been obliged to pay them without taxation, in order to facilitate the supersedeas of his commission. As a general principle of public policy, it is not to be permitted to a solicitor, upon such an arrangement between a bankrupt and his creditors, to secure an advantage to himself beyond his legal rights.

The bills were ordered to be taxed, with the usual directions.

V. C.
LINC. INN.
August 15,
1825.

Ex parte MARSHALL. — In the matter of BELL.

Petition by assignee, praying that the petitioning creditor under a prior commission, who had received a sum of money from the bankrupt on condition of not proceeding with such commission, and had accordingly abandoned such commission, might refund the money so received, dismissed with costs, on the ground that the Court had not jurisdiction.

PETITION by the assignee under a commission issued against *Bell* in September 1824, stating, that on the 1st of May 1824 a commission had issued against the bankrupt, on the petition of *Edmund Hamer*, who claimed a debt of 1,317*l.* against the said bankrupt; that after the issuing of the said commission, the said *Edmund Hamer* privately received from the bankrupt the sum of 210*l.*, on condition that the same should not be opened; and that accordingly the said commission was not opened, and the petition prayed that the money so received by *Hamer*, together with interest, might be refunded and paid to the petitioner.

On the part of *Hamer*, it was denied that the payment of 210*l.* was made in order to induce him not to proceed with the commission; and it was disputed whether the payment was made after the sealing of the commission.

Mr. *Horne* and Mr. *Rose* for the petition.

Mr. *Agar* and Mr. *Montagu* objected, that the Court had no jurisdiction, under this commission, to make an order upon the petitioning creditor under a former commission that had expired. The statute upon this point is highly penal (*a*); and if the charge be true, not only the composition received, but the whole debt is forfeited. This is not to be decided upon a petition, but by a trial at law.

Mr. *Horne* and Mr. *Rose*, in support of the petition, contended that *Hamer*, by making use of the process

(*a*) 5 *G.* 2. c. 30. s. 24. — altered by 6 *G.* 4. c. 16. s. 8.

1825.

Ex parte MARSHALL. In the matter of BELL.

under the great seal, had rendered himself amenable to its jurisdiction, not only under that, but under any commission against the same person. He thereby pledged himself to the fact of the bankruptcy. The supersedeas does not put an end to the jurisdiction in bankruptcy, since the Court may at any time order a *procedendo*. Jurisdiction in bankruptcy is general, and not referable to any particular commission.

The VICE-CHANCELLOR.

I am clearly of opinion, that the Court has not jurisdiction upon this petition to make the order, as it is prayed. The statute provides, that if the petitioning creditor privately compounds with the bankrupt, such composition is an act of bankruptcy, and a new commission may issue upon such act. If another creditor had petitioned for a commission on the ground of such secret composition, that would have involved the question whether there were such secret composition or not; and if the fact of a secret composition were proved, the Court might have jurisdiction, not only to order the commission should be superseded, and a new commission issued, but that the money received while the former commission was in operation should be refunded, as provided by the statute. This, however, is not such a petition; and I am of opinion that I have no jurisdiction.

Petition dismissed with costs.

Ex parte ANTHONY. — In the matter of RICHARDS.

V. C. LINC. INN. *August* 15, 1825.

The Court will not review the allowance by the commissioners of the assignees' accounts, except in matter of principle.

THIS petition, by one of the assignees, stated, that the commission issued in April 1813; that suspicions had been entertained by the creditors of fraudulent conduct by the bankrupt; and that representations had been made to the creditors, that the petitioner and his co-assignee had not investigated the affairs of the bankrupt with that vigilance which their importance required; and that at the meeting appointed for the bankrupt's last examination, the commissioners refused to allow him to pass his examination, until an investigation of his accounts and dealings should have taken place; that at such meeting it appeared that the books of the bankrupt were most improperly kept, without any method, in many places scarcely legible, and without order of date; that in consequence of such representations by the creditors, and the strong disapprobation expressed by the commissioners of the conduct of the bankrupt, the petitioner, who had previously left the chief management of the estate to his co-assignee, had resolved to take an active part, and do the utmost in his power to detect any fraud which might have been practised, and accordingly took possession of the books; that the intricacy of the method which the bankrupt had adopted in his book-keeping, and the number of suspicious entries, were apparent as the investigation proceeded, and exhibited strong proof to the petitioner, and to many of the creditors, of a systematic attempt by the bankrupt to defraud his creditors; that to detect such frauds it became necessary to form new books, and to make certain transcripts from the old, which occupied the petitioner,

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Ex parte ANTHONY. In the matter of RICHARDS.

with scarcely any intermission, four months; that from the confused state of the accounts, and from the irregular mode in which the books had been kept, it appeared to the petitioner and the creditors to be impossible to arrive at any just conclusion as to the conduct of the bankrupt, unless some experienced accountant were employed; in conformity, therefore, to the wish of the creditors, and with the knowledge of the commissioners, an accountant was employed, who investigated the accounts for the period of eight months previous to the bankruptcy, during which investigation it was clearly ascertained that there were many thousand pounds unaccounted for; that he made his report, whereupon it was deemed necessary to extend their examination to a period of eight months still further back, which was accomplished after great labour and exertion; that the entries in the bankrupt's books were so illegible that it became necessary to transcribe a great part of them; that to save expence to the estate, the petitioner had himself, with the occasional assistance of his clerks, transcribed books of account to the extent of 1,490 pages; and in order to use the utmost dispatch, and to prevent any interruption in the progress of such accounts, the petitioner had agreed with the bankrupt and the different clerks employed, that if they would work without any intermission he would supply them with their meals, which he did at the least possible expense, and by which he must have been a considerable loser; that during the inquiry, the opinion of the commissioners had been from time to time taken, and they were extremely dissatisfied with the conduct of the bankrupt, and for upwards of six months, during which time nine adjourned meetings took place, and until the 27th of November 1813, refused to allow him to pass his examination; that as these transactions took place so long since as the

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year 1813, many of the creditors, at whose desire and with whose concurrence the petitioner undertook this investigation, were dead; the major part of the commissioners, also, before whom the business was transacted, and who well knew the necessity of and by whom such measures were sanctioned, were dead; and in January 1824 a renewed commission was issued to commissioners who were not acquainted with the circumstances in which such investigation originated; that, at the audit meeting under the renewed commission, the petitioner produced his account for expences incurred in the course of such investigation, amounting to the sum of 218*l.* 2*s.* 11*d.*, which had been actually paid by the petitioner for such purposes, solely for the benefit of the estate, and in discharge of his duty as assignee, and which the petitioner was satisfied would have been allowed, had the original commissioners still lived, but of which the commissioners under the renewed commission refused to allow more than the sum of 76*l.* 15*s.* 6*d.*; and that the opposition to the allowance of this disbursement had been made by the bankrupt, and *Gregory*, a creditor.

The petition therefore prayed, that the petitioner might be allowed th said sum of 218*l.* 2*s.* 11*d.*, or that it might be referred to the master to inquire and report whether such expences were necessarily and properly incurred.

Mr. *Rose* and Mr. *Kaye*, in support of the petition, contended, that though an assignee could not charge the estate for work done by himself, yet it had never been questioned, that he had a discretion to call in the aid of an accountant at the expence of the estate, when it was sanctioned by the creditors and the commissioners. *Ex parte Read*, in the matter of *Sowerby*. (*a*) That the

(*a*) 1 *Glyn & Jam.*, p. 77.

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Ex parte ANTHONY. In the matter of RICHARDS.

petitioner asked only to be repaid the expences actually incurred.

Mr. *Sugden* and Mr. *Collinson*, for *Gregory*, the opposing creditor, and the bankrupt,—Mr. *Keene*, for *Urquhart*, the co-assignee, who opposed the petition, were stopped by the Court.

The VICE-CHANCELLOR.

It may be correctly stated, that the assignees are entitled to the expences necessarily incurred in the examination of the accounts; and the commissioners do not appear to have denied that principle, since they allow the propriety of the charge for the assistance of an accountant, but object to the amount charged. It may be admitted indeed for present purposes, that all the expences incurred by the petitioner were necessarily incurred, and that all the allegations in the petition are supported by evidence; still this appeal from the commissioners, not in respect of any wrong principle of taxation, but of their judgment in the amount to be allowed, cannot be entertained by this Court. They are the competent jurisdiction for settling the accounts of the assignees; and I cannot enter into the consideration of the quantum of the allowance made by the commissioners, but only of the principle upon which they have proceeded. In this respect the case resembles the master's report upon the taxation of a solicitor's bill of costs, or the passing of a receiver's account.

Petition dismissed with costs.

Ex parte HARGRAVES and SHAW. — In the Matter of BLACKBURN.

V. C. LINC. INN. *August* 16, 1825.

Bankrupt retaining possession of a cottage and land, which had passed to the assignees by the bargain and sale under the commission, and which the assignees had contracted to sell, ordered to deliver up possession within fourteen days after personal service of the order.

PETITION by the assignees, stating that a bargain and sale of the bankrupt's real estate had been duly executed to them in August 1824; that the bankrupt was, at the time of his bankruptcy, possessed of certain messuages and land, and that they the assignees had contracted to sell part of the land, with a cottage thereon; that the cottage and part of the land so contracted to be sold was still in the possession of the bankrupt, and the petitioners had caused a demand to be made upon him to deliver up possession to them, but that he had refused to comply with such demand, and still retained possession. The petition prayed, therefore, that the bankrupt might be ordered to deliver up the said cottage and land to the petitioners.

Mr. *Horne* and Mr. *Rose* for the petitioners.

Mr. *Wakefield, contra*, stated from the affidavit of the bankrupt, that a petition to supersede was pending; and contended that this application was altogether unnecessary, and could not be entertained. The assignees, under the assignment and bargain and sale, already possessed full power over the property.

The VICE-CHANCELLOR ordered that the bankrupt should deliver up possession within fourteen days after personal service of the order.

L. C.
LINC. INN.
Aug. 15.
1825.

Ex parte GLOVER.— In the matter of MUNDELL.

Petitioning creditor, who shortly before the commission had taken out execution against the bankrupt for part of the debt on which the commission issued, ordered to furnish the assignees with the particulars of his debt, and the time at which it was contracted, in aid of an action brought by the assignees against the sheriff, impeaching the execution, on the ground of its being overreached by an act of bankruptcy, which was available against the execution if a competent part of the petitioning creditor's debt was contracted before it.

THIS petition of the assignees stated, that on the 27th of March 1823 a commission of bankrupt issued against *Mundell*, on the petition of *John Leece*, under which he was found bankrupt, and Messrs. *Orred*, *Lowe*, and *Hurry*, of Liverpool, were employed to issue and prosecute the commission; that on the 24th of April 1823 the petitioners were chosen assignees, and they employed Messrs *Law* and *Coates* as solicitors to the commission; that shortly afterwards the petitioners discovered that on the 10th of March 1823 *Leece* had obtained a judgment against *Mundell* for 1,200*l.*, and on the 13th of March had lodged with the sheriff a *fieri facias* indorsed to levy 700*l.*; and that on the said 13th of March the sheriff had seized property of the bankrupt to a large amount, but at the request of *Leece* the officer did not himself remain in possession of the property, and permitted the son of *Leece*, and an attorney of the name of *Leece*, to remain in possession, in order, as the petitioning creditor stated on his examination before the commissioners, that *Mundell* might not be hurt in his credit, and which enabled *Mundell* to obtain further credit, to the injury of those who were induced to credit him; that on the 27th of March 1823 the sheriff's officer proceeded to a sale of the goods seized, and paid the proceeds, amounting to several hundred pounds, unto *Leece*; that *Orred*, *Lowe*, and *Hurry* were the solicitors employed in the execution as well as the commision; that the debt of *Leece*, on which the commission issued, existed many months before the commission, and that *Mundell* had committed many acts of bankruptcy prior to the 13th of March 1823, some of which had been committed within two months

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prior to the commission; that the petitioners, on the 29th of June 1823, brought an action, in his Majesty's Court of Common Pleas at Lancaster, against the sheriff, for the recovery of the property seized; and on or about the 26th July the said Messrs. *Orred, Lowe*, and *Hurry* pleaded the general issue in the said action, with notice of disputing the petitioning creditor's debt of the said *Leece*, and the trading and act of bankruptcy of *Mundell;* that on the 29th of July the petitioners solicitors issued subpœnas in the action, and subpœnaed several witnesses; that on the 6th of August the petitioners solicitors received notice from Messrs. *Orred, Lowe*, and *Hurry*, that they did not intend to dispute the petitioning creditor's debt, the trading and act of bankruptcy, on the trial of the said action; that on the 17th of August the solicitor of the petitioners repeatedly requested *Leece* to furnish him with the means of proving the debt of the said *Leece*, an inspection of the securities which would prove such debt, and the names of the subscribing witnesses to such securities; but that *Leece* refused to give any information, stating the matter was in the hands of his attornies, *Orred, Lowe*, and *Hurry;* that at an interview, on the 17th of August, between the petitioners solicitors and the said *Leece* and *Hurry*, they, the said *Leece* and *Hurry*, declined to give any information as to the said debt; that the petitioners caused the said *Leece* to be served with a notice in writing, requiring him to produce, on the trial of the action, the necessary evidence of the debt, and of the greatest length of time it had existed, and to produce the securities given by *Mundell* to *Leece* for securing the debt, and the names and places of residence of the subscribing witnesses to such securities, and of the several persons capable of proving such debt, and to furnish the particulars of the debt; that the said *Leece*,

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on being served with such notice, refused to give any information, stating, he had been advised so to do by *Orred*, *Lowe*, and *Hurry*; upon which the petitioners solicitors informed *Leece* that they should be obliged to countermand the action; and the petition prayed that *Leece* might be ordered to furnish to the petitioners forthwith, the particulars of the said debt, with the dates and times the same was contracted, and when the different parts thereof became due, and with copies of the securities given for the said debt, and of the attesting witnesses thereto, and generally all such evidence as it was in his power to furnish to establish his aforesaid debt; and to permit the petitioners solicitors to inspect the original securities; and that such original securities might be placed in the hands of the prothonotary of the Court of Common Pleas at Lancaster, in order to their being produced at the trial of the said action.

Mr. *Hart* and Mr. *Spence*, for the petition, contended, that the petitioning creditor was bound to give all information in his power as to his debt, and the time and manner of its accruing, whatever might be the consequential effect of such disclosure on any other proceeding in which he might be interested; that here there was an act of bankruptcy prior to the execution, and if there were a sufficient debt previous to such act, the petitioning creditor could not by his commission secure to himself a privilege and indemnity which he would not otherwise have. A petitioning creditor is not entitled, on account of his own personal conflicting interest, to deprive the creditors under the commission of any benefit which the commission may enable them to obtain, and which, too, might have been obtained under another commission. *Ex parte Glossop*, 2 *Rose*, 386. *Ex parte Graves*, 1 *Glyn & Jam.* 86.

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Mr. *Horne* and Mr. *Rose*. The reasoning on the other side proceeds on a fallacy. It is admitted that the petitioning creditor is bound to give information to the assignees, to enable them to sustain the commission; but here the information is sought from the petitioning creditor for a very different purpose, to overturn his execution, a proceeding quite unconnected with the commission, and in which he stands in a distinct character, owing no duty to the creditors under the commission. The application is opposed by the established principles of law; and the authorities cited only shew that the petitioning creditor must give such information as will sustain the commission, which is admitted, but do not extend to prove that he is compellable to give evidence beyond the maintenance of the commission, in order to defeat his own interest.

March, 1825.

The VICE-CHANCELLOR.

The petitioning creditor is bound to give all such information as may be supposed to be particularly within his knowledge as petitioning creditor, and to render his assistance in all cases connected with his character as petitioning creditor; but here he unites a distinct character, of a creditor having levied execution previous to taking out his commission. I know of no authority to sanction the compelling him to give evidence against his own execution; and I am of opinion that I have not jurisdiction to make such an order. The petition must be dismissed with costs.

Against this order of his Honor the Vice-Chancellor, the petitioner appealed, and the appeal was argued before the Lord Chancellor by the same counsel, on the same grounds, on the 15th of August 1825.

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The LORD CHANCELLOR.

The petitioner levied execution on the 13th of March, but not in satisfaction of his whole debt. Part of the same debt constitutes the debt to support the present commission; and the question is, whether the petitioning creditor is not, by taking out the commission, pledged to give all such information as may enable the assignees to recover property for the creditors to as large an amount as possible, as will enable them to make the commission as extensively available for the creditors as on the fullest information it may be rendered; and it appears to me that he is so bound. The petitioning creditor, availing himself of his legal right, has taken out a commission, which he requires this Court to sustain, and which prevents the taking out another commission, which might have overturned the execution. I think he must disclose the whole truth of the transactions relative to his debt, and the time at which it accrued, and the securities that have been given him by the bankrupt for this debt.

The order was, Now, upon hearing, &c. I do think fit to discharge the said order made in this matter by His Honour the Vice-Chancellor; and I do order that the said *John Leece*, as the petitioning creditor under said commission of bankrupt issued against the said *Joseph Mundell*, do forthwith deliver to the said appellants *John Glover*, *David Cannon*, and *William Gemmell*, the assignees of the estate and effects of the said bankrupt, the particulars in writing of the debt owing by the said *Joseph Mundell* to the said *John Leece* on the 10th of March 1823, with the several dates and times when the said debt was contracted, and when the different parts thereof became due. And I do also order that the said *John*

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Leece do also, forthwith, furnish the said petitioners with the particulars, in writing, and true copies of the several securities (if any) given by the said bankrupt *Joseph Mundell* to the said *John Leece*, and the names of the attesting witnesses thereof, and generally with all such evidence as it is in his power to furnish, to establish his aforesaid debt; and do furnish the said petitioners' solicitors, or any person appointed by them to inspect the original securities, with copies thereof; and that such original securities be placed in the hands of the prothonotary of the Court of Common Pleas at Lancaster, in order to their being produced at the trial of the said cause against the said sheriff.

L. C. *Dec.* 19, 1825.

In the Matter of Sir WILLIAM ELFORD and Co.

APPLICATION to supersede a commission in which the bankruptcy had not been adjudicated, on the ground of the affidavit of debt having been sworn before the solicitor to the creditor petitioning for the commission.

The LORD CHANCELLOR decided, after consideration, that it was not a valid ground of objection to the docket papers, that the affidavit of debt, on striking the docket, had been sworn before the solicitor suing out the commission.

Mr. *Heald* for the petition.

Mr. *Montagu* and Mr. *Glyn* against it. (*a*)

(*a*) The same point was raised in the matter of *Whittle*, Feb. 25, 1826, when the Lord Chancellor again held, that it was no objection to the sufficiency of the docket papers, in conformity with the decision as reported above.

L. C.
LINC. INN.
Aug. 15,
1825.

Ex parte HERBERT. — In the Matter of HERBERT.

A. having proved a debt, and afterwards sold and assigned it, permitted to sign the bankrupt's certificate after such assignment, without the consent of the assignee.

THE facts of this case, and the judgment of His Honour the Vice-Chancellor thereon, are reported, 1 *Glyn & Jam.* 399.

This was an appeal from the order of the Vice-Chancellor, whereby the name of *Herbert*, the father of the bankrupt, and who had, after the commission issued, sold and assigned his debt, was directed to be erased from the certificate.

Mr. *Horne* and Mr. *Rose* for the appellants.

The Solicitor-General, for the respondents, argued, that the vendee of the debt was entitled to the same opportunity of giving his judgment on the conduct of the bankrupt as the original creditor; that this Court, in bankruptcy, would not lay out of view the equitable rights of the parties; and that the father, who had parted with all his interest in the debt, never could be permitted to exercise so important an act in respect of the estate of the debtor as the signature of the certificate, operating in the nature of a release of the debt, against the will of the persons to whom he had transferred his whole interest.

The LORD CHANCELLOR.

The peculiarity of this case is, that the equitable right of the persons seeking to restrain the creditor who has proved did not accrue until after the bankruptcy. Where there is trustee and cestuique trust, constituted before the

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Ex parte HERBERT. In the matter of HERBERT.

bankruptcy, the cestuique trust may find means of preventing the trustee from proving alone, so as to give him the exclusive power over the certificate; but even there, if the trustee be permitted to prove alone, he would be entitled to sign the certificate. My doubt in this case is, whether the legal title of the original creditor can be restrained by persons who have no right in themselves to controul the certificate, as their interest accrued subsequent to the commission; whether any man, not having any power himself over the certificate, can say you shall not sign it. I remember no instance where, after a creditor had proved and had subsequently assigned his debt, the purchasers, who could not have come in before the bankruptcy, have been permitted to influence the certificate. If the next of kin came to restrain the administrator from signing, and the administrator said the bankrupt had conformed, I doubt whether the Court would restrain him. It must be argued to this extent, that the purchaser could compel such a vendor to sign the certificate. My present opinion is, that *Herbert*, the father, had a right to sign the certificate.

The order of the Vice-Chancellor was discharged, and the certificate allowed.

V. C.
LINC. INN.
March 25,
1825.

Held that a creditor, whose debt had been omitted in the schedule filed in the Court for the relief of insolvent debtors, by an insolvent who had obtained his discharge under the insolvent acts, might maintain a commission founded on that debt.

Ex parte SHUTTLEWORTH. — In the matter of PACEY.

PREVIOUSLY to the issuing of the commission, the bankrupt had been discharged under the Insolvent Debtors' Act. In the schedule of debts delivered in by the insolvent, a debt due to *John Montgomery* was not included. Upon this debt a commission issued. This was a petition by the assignee under the insolvent act to supersede.

Mr. *Horne* and Mr. *Montagu*, for the petition, contended, that where there was, as in the present case, no property but what might be more beneficially distributed under the Insolvent Act, than by so expensive a proceeding as bankruptcy, the Court would interfere, and restrain the issuing of a commission, whatever might be the abstract right of the party to take it out.

Mr. *Heald* and Mr. *Rose*, for the petitioning creditor, supported the commission. The creditor who had not his name in the schedule was deprived of all share in the distribution under the Insolvent Act, and was driven to his action at law. There could be no question, therefore, of his right, both in law and conscience, to issue a commission, since he had no power whatever to get his name inserted in the schedule.

The VICE-CHANCELLOR.

The question here is, whether a creditor whose name is not inserted in the insolvent's schedule is so far deprived of his share of the property distributable under the Insolvent Act, as to entitle him to issue a commission.

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Ex parte SHUTTLEWORTH. In the matter of PACEY.

It is a matter of serious doubt, whether, in a case where there is no property but what might be properly administered under the insolvent law, without calling in aid the more extensive powers of a commission, this Court will allow a commission to stand, if there be reason to think it has been issued wantonly and without an adequate object, and by one who might have had the benefit of the assignment in the insolvency. I am inclined to think that, under such circumstances, the Court would restrain a commission unnecessary in itself, and productive of unnecessary expence. This case must, however, depend upon the fact, whether, notwithstanding the omission of the name of this creditor in the schedule, the creditor might nevertheless come in, *pari passu*, with the creditors named in the schedule; or whether he would be driven to an action, against which the assignment could not be pleaded. In the latter case, any creditor whose name was not so inserted might issue a commission which this Court would support, though he might be the only creditor who could be benefited by it.

March 28, 1825.

It appeared, upon reference to the Court for the relief of insolvent debtors, that a creditor whose name was omitted in the schedule could not by any act of his own get his name afterwards inserted in it; and the Vice-Chancellor therefore decided, that the petitioning creditor was justified in taking out the commission, and dismissed the petition with costs.

LINC. INN. *March* 26, *August* 17, 1825.

Petition by messenger, praying that the solicitor to the petitioning creditor, who was insolvent, might pay the messenger's costs up to the choice of Assignees, dismissed with costs: Solicitor not liable to messenger, except upon special contract.

Ex parte BURWOOD. — In the matter of HOWARD and GIBBS.

THE petition stated, that in Februrary 1821 a commission had issued against *Howard* and *Gibbs*, upon the petition of *Francis Campbell*, under which the petitioner was appointed messenger, and his bill to the choice of assignees was taxed by the commissioners at the sum of 136*l.* 10*s.* 11*d.*; that *George Smith*, of Golden Square, was the solicitor who acted in the issuing of such commission, which had been superseded for want of a valid petitioning creditor's debt; that *Campbell*, the petitioning creditor, was in distressed circumstances, and utterly unable to pay the petitioner's bill; that the petitioner had applied to *Smith*, but he had refused to pay the same; that in the examinations before the commissioners, upon a reference respecting the petitioning creditor's debt, it appeared, as the fact was, that the commission had been issued by *Campbell*, upon a bill transferred to him by the said *Smith*, and with full knowledge by the said *Smith* of the circumstances and situation of *Campbell*.

The petition prayed, that the said *Campbell*, or *Smith*, might be ordered to pay to the petitioner his said bill, and the costs of the application.

Mr. *Heald* and Mr. *Montagu*, for the petition, contended, that *Campbell*, in this case, having been the tool of *Smith* in issuing a fraudulent commission, *Smith* must be looked on as the real petitioning creditor, and held liable to those charges which petitioning creditors are usually bound to pay. The solicitor is at law clearly liable to the messenger: it is the solicitor who

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appoints him, and to whose responsibility he looks. In *ex parte Nixon*(*a*), the decision was against the messenger, because of his own laches, not from any doubt of his right upon principle. *Ex parte Hartop* (*b*) is conclusive, that the Court has jurisdiction, and that the solicitor is liable.

Mr. *Horne*, Mr. *Treslove*, and Mr. *Knight*, *contra*, denied the jurisdiction of the Court in this case, to compel the solicitor to pay what by law is to be paid by the petitioning creditor. Even in a case where the solicitor bound himself to pay the expences, this Court would not interfere after supersedeas, but leave the party to his action upon the contract. *Hart* v. *White*, 1 *Holt*, 376; *Hart* v. *Biggs*, 1 *Holt*, 245; *Hartop* v. *Jukes*, 2 *Mau.* & *Sel.* 438.

The VICE-CHANCELLOR.

It is contended in this case, that the solicitor is at law liable to the messenger for his bill, and if liable at law, then that he is liable within the jurisdiction of this Court in bankruptcy; and further, that if not strictly liable at law or in bankruptcy as solicitor only, still that he is liable, in the present case, not as solicitor, but as petitioning creditor, *Campbell*, the nominal petitioning creditor, being in fact the mere instrument of his fraud.

According to the decisions at law (*c*), the solicitor is in no case liable to the messenger, except upon special contract. The case *ex parte Hartop*, which has been mentioned as countenancing a different principle, does not go to the extent that is here contended for; and even sup-

(*a*) Cited 12 *Ves.* 349. (*b*) 12 *Ves.* 349.

(*c*) *Hart* v. *White*, *Holt* 376. *Hartop* v. *Jukes*, 2 *Mau.* & *Sel.* 438.

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posing for a moment that the solicitor were liable at law, it would by no means follow that such a demand could be the subject of a petition in bankruptcy. The petitioning creditor is the person liable to the messenger; it is therefore charged that *Smith* is substantially the petitioning creditor, and liable in that character. Upon reading the examinations before the commissioners which are set out in the petition and the affidavit of *Smith*, I do not think the petition, and the evidence in support of it, as they are met by that affidavit, sufficiently strong to fix *Smith* as petitioning creditor, if my decision had depended upon these facts being established against him.

My opinion is, that the solicitor is not liable to the messenger in any case except upon special contract, as any agent may be, though as agent only he clearly is not.

Petition dismissed with costs as against *Smith*; the order made as against *Campbell*.

The order of the Vice-Chancellor was confirmed, upon appeal to the Lord Chancellor, August 17, 1825.

Ex parte SHAW, HERMON, and CHAPPELL.— In the matter of HOWARD and GIBBS.

V. C. LINC. INN. *April* 3, 1824.

Messenger having possessed property of the bankrupts, under a commission against them, which had been superseded, and for which property he had not accounted to the assignees under that commission, ordered to account for the same to the assignees under a subsequent subsisting commission.

THE petition, by the assignees, stated, that a commission had issued against *Howard* and *Gibbs* in February 1821, under which the petitioner *Shaw*, together with *Carroll* and *Duff*, had been chosen assignees, but which commission was, in August 1821, superseded for want of a petitioning creditor's debt; that on the 22d of the same month a new commission was issued, which was now in prosecution, and under which the petitioners were assignees; that *William Burwood* had been appointed messenger and provisional assignee under the first commission, and as such took upon himself the custody and possession of the effects of the bankrupts, part of which effects consisted of two valuable stocks of wines; that upon the issuing of the commission now in prosecution, *Burwood* was appointed messenger, in consequence of his being then in the actual possession of the bankrupts' papers, and of the effects of the said *Gibbs*; and at the opening of such commission he again took possession of the bankrupt *Howard*'s effects, and had the care of his wine cellars, as well as those of *Gibbs*, until May 1822, when he was discharged by the petitioners; that inventories of the wines, &c. in the cellars of the said bankrupts had been taken when *Burwood* took possession under the first commission, and delivered to the commissioners; which inventories, after the opening of the commission now in prosecution, were compared with the effects of the said bankrupts respectively, with accounts of increase and decrease of the effects enumerated therein, and again exhibited to the commissioners; that by such

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inventories it appeared that there was a large deficiency in such wines; that *Burwood* had received from the assignees, under the first commission, the sum of 100*l.* on account of his bill for possession under that commission, and had commenced and was prosecuting an action against the petitioner *Shaw*, and the other parties who had been assignees under that commission, for 208*l.*, the balance alleged to be due to him under such first commission; that accounts of the said deficiencies had been sent to the said *Burwood*, by the petitioners, at the time of his discharge, with notice that he would be held responsible for the same; that the said *Burwood* had delivered to the petitioners his bill as messenger under the present commission to the choice of assignees, taxed by the commissioners, and amounting to the sum of 432*l.* 5*s.* 5*d.*, with an order of the commissioners for the payment thereof; but which bill the petitioners were advised they ought not to pay without instituting an examination into the deficiencies of the wine, and submitting the matter to the consideration of the Court.

The petitioners, after setting out several items contained in the messenger's bill as objectionable, prayed that it might be referred to the commissioners to take an account of the deficiencies of wine, &c. in the cellars of the said bankrupts, during the time the said *Burwood* had the custody thereof, and that it might be referred to one of the Masters to review the taxation of the said *Burwood*'s bill up to the choice of assignees; and that what the commissioners should certify to be the value of such deficiencies might be set off against what the Master should certify to be the amount of his bill; and in case such deficiency should be of more value than the amount of such bill, then that the said *Burwood* might be ordered to pay to the petitioners so much thereof as should not

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be covered by the amount of such bill; and that in the meantime *Burwood* might be restrained from proceeding in his action against the petitioner *Shaw* for the amount of his said bill of costs.

The sum claimed by *Burwood* was directed to be paid into Court; and at the suggestion of his Honour the Vice-Chancellor, an allegation was introduced by amendment, that *Burwood* had never accounted to the assignees under the first commission for the wines, &c. belonging to the said bankrupts, and possessed by him under the commission.

Mr. *Horne* and Mr. *Treslove* for the petition.

Mr. *Hart* and Mr. *Montagu* against it.

The Court has no jurisdiction to compel the messenger to account without bringing the assignees, his employers, before the Court. The course is to call upon the assignees under the superseded commission to account for property received by them or their agents to the assignees under the existing commission, by which the messenger's accounts would be included. He is responsible to no one but the assignees under that commission under which he received the property, whose servant he is. Their orders may be pleaded, and may afford a sufficient justification of his conduct; and though the disposal of the property may have been highly improper as regards them, yet the messenger has no right to refuse to execute their orders. If the deficiency charged be established, it is the subject of an action at law, not of a petition in bankruptcy. It is a question for a jury only, whether he is to be charged with the value of the wines abstracted. At all events, if any inquiry be

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granted, it must be confined to what has taken place under the present commission.

Mr. *Horne* in reply.

The Court has jurisdiction to order the messenger and provisional assignee under a former commission to account, as fully as an assignee chosen by the creditors: he is the officer of the Court, not during the commission only, but permanently; and being an officer in bankruptcy generally, he is responsible to the Court, not under any special commission, but under the general jurisdiction of the Court in bankruptcy. The messenger, by proceeding against one of the present petitioners in his character of assignee, and calling for the sum claimed under both commissions to be paid into Court, has submitted to the jurisdiction in bankruptcy, even supposing there were any well-grounded doubt as to jurisdiction.

VICE-CHANCELLOR.

It is immaterial for present purposes, whether the charges brought forward in this petition are true or false. If it were necessary for the purpose of the present petition to decide upon those charges, I should not determine upon them without further inquiry. The only question now is as to the jurisdiction; whether, as the petition is now framed, I can direct the reference prayed, without having other parties before the Court. When this petition was first called on, it was said that the messenger was only accountable to the assignees, his employers; and that they not being before the Court, he must be presumed to have accounted to them, and was not accountable to the present petitioners, who are strangers as to the superseded commission. I

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therefore directed the petition to be adjourned, with liberty to amend, as the petitioners should be advised, and that they should pay into the Bank of England, in the name of the Accountant General, the sum of 432*l.* 5*s.* 5*d.* in trust in the matter, and subject to my further order. I am clearly of opinion that I have jurisdiction. The messenger is an officer of the Court, and his appointment must be intended to prevail during the office of the commissioners. Supposing no assignees had been chosen, can it be doubted, that the Court could call upon its own officer to account for his conduct under a commission; and I am of opinion that the Court has the same jurisdiction where the messenger has not accounted to the assignees under the first commission; and that he is now liable to account to those who succeed them: if he had alleged that he had so accounted, it would have been necessary to have brought his former employers before the Court.

It was ordered, that it should be referred to the Master, to inquire and state to the Court, whether the said *William Burwood* was chargeable to the estate of the said bankrupts with any and what sum of money in respect of any deficiency in the quantity of wines and liquors, lately the property of the said bankrupts, during the time the same were under his care and custody, either under the former or under the present commission, with liberty to state special circumstances; and that the said Master should tax the bill of costs of the said *William Burwood* as messenger under the said present commission up to the choice of assignees under the said commission; and that all further directions on the matter of the said petition, as also the consideration of costs, should be reserved.

V. C. LINC. INN. *March* 1, 1825.

Ex parte LEECH. — In the matter of ROWE.

MR. *TRESLOVE*, for the respondent, made a preliminary objection to the hearing of this petition. It had been called on upon a former day, and had been ordered to stand over, the petitioner paying the costs of the day. A demand had been made, but the costs had not yet been paid.

No affidavit of the demand having been made was produced.

Mr. *Horne*, for the petitioner, stated, that no order for the payment of such costs had ever been served.

The VICE-CHANCELLOR said, that it was not necessary that the order for the costs of the day should be drawn up, the amount being so small. There must, however, be an affidavit of the fact of the demand having been made, ready for production in Court, before such a preliminary objection could be admitted.

Ex parte BRIGHT. — In the matter of CLARK.

V. C.
LINC. INN.
March 22,
1825.

On petition by lessor to compel assignees to elect whether they will accept or decline the lease, the Court has no power under the statute to make the assignee pay the costs, or to give the lessor the costs out of the bankrupt's estate.

THE petition and affidavit stated, that *Henry Tovey*, who held a lease of certain premises in Speldhurst-street, for 40 years from May 1817, granted to *William Clark* a lease of the same for 21 years from January 1822; that, in January 1823, *Tovey* assigned to the petitioner the remainder of his term in the said premises so demised to *William Clark*; that, in October 1824, *Clark* was declared bankrupt, since which the premises had remained unoccupied; that, on the 7th of December 1824, the petitioner had caused a notice in writing to be served on *Lewis*, the assignee of the bankrupt's estate, requiring him forthwith to determine and elect whether he would accept the lease of January 1822, or whether he would deliver up the same; that the petitioner had made other applications to the said *Lewis* to a similar effect, but that he still refused so to elect; that the petitioner still continued to pay the ground-rent for the premises, and had been called upon to pay an arrear of taxes claimed to be due in respect thereof; that there were no goods or property on the premises, whereon the petitioner might distrain for the arrears of rent then due to him: the petition, therefore, prayed that the said *Lewis* might be ordered to accept or deliver up the lease and possession of the premises, and declare such option, and perform one of such alternatives, either immediately or within ten days from the hearing of the petition, and that he might pay to the petitioner the costs of such petition.

Mr. *Knight*, for the petition, contended, that as the petitioner had done all in his power to induce the assignee to make his election before he was driven to petition by

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Ex parte BRIGHT. In the matter of CLARK.

the wilful delay in the assignee, the Court would make the order with costs against the assignee; or at least would give the costs out of the estate, since the estate had been benefited by the length of time taken for considering the expediency or inexpediency of adopting the lease.

Mr. *Barber contra.*

The VICE-CHANCELLOR.

There is no precedent for giving costs in a case like the present. The statute empowers the lessor to petition to compel the assignee to elect, but does not authorize the Court in any case to give costs. Take the order to elect.

L. C. LINC. INN, *August* 20, 1825.

In the matter of DAVIS.

MR. *MONTAGU* stated, that in the case of this bankrupt's certificate some irregularities appeared, and the commissioners could not proceed to certify without the sanction of the Court. The order of August 8th, 1809, requires that at the time of signing their consent the creditors respectively should write, opposite their names, the day of the month and year on which they respectively signed. In many instances in this certificate, instead of repeating the day of the month, the word "ditto" was added; in other cases the year was omitted; but as the certificate was signed in the same year in which the commission issued, it was self-evident what year was meant.

The LORD CHANCELLOR did not think the objections material; but considered that it would have been improper to have proceeded without mentioning it to the Court.

1825.

In the matter of DAVIS.

In the matter of MOSES BARBER.

L. C. LINC. INN, 1826.

MR. *Glyn* made an application for an amendment of the name of the quorum commissioner in the direction of the commission, the name having been spelt *Stockdell* instead of *Stockdale*. The commission had been issued and the bankruptcy declared, and Mr. *Stockdale* was one of the commissioners who signed the adjudication of bankruptcy. The Lord Chancellor ordered the other commissioners to proceed to a new adjudication.

Ex parte LADBROKE and others. — In the matter of JOHN PARKES, JOHN PARKES the younger, and JOSIAH PARKES. *Ex parte* MILLS. — In the same matter.

LINC. INN. *Aug.* 1823. *April*, 1826.

BY the original petition of Messrs. *Ladbroke* and Co. it appeared, that the bankrupts, for many years previously

Where a debt of 27,620l. 19s. 10d. was due from the bankrupts,

at the bankruptcy, to their bankers, on a balance of account, and such balance was covered by joint promissory notes of the bankrupts, to the extent of 18,000l., and also by a mortgage of some property belonging to one of the bankrupts, with joint and several covenants from each of them for the payment of the whole balance; and part of the debt, to the amount of 17,000l., had been permitted to be proved by the bankers against the joint estate, on their petition, for the purpose of their commanding the choice of assignees: Held, that the bankers were entitled to a proof of the 18,000l. against the joint estate, and to prove the residue against the separate estate of one of the bankrupts.

1823.

Ex parte LADBROKE. In the matter of PARKES.

to the issuing of the commission against them, kept a banking account with the petitioners Messrs. *Ladbroke* and Co. bankers in London, and that in the course thereof the said petitioners had been in the habit of making large cash advances to them, and that at the date of the commission, which issued on the 9th of May 1822, there was due to the petitioners from the said bankrupts the sum of 27,620*l.* 19*s.* 10*d.*, on a balance of accounts, for cash advances; and that the sum of 18,000*l.* part of such balance, was secured by five several promissory notes, dated the 24th of December 1818, drawn by the bankrupts, and made payable to the petitioners on demand; and that of such notes two were for 5,000*l.* each, two for 3,000*l.* each, and one for 2,000*l.*; and that as a further security for the said sum of 18,000*l.*, and all such other sums as the petitioners might advance to the bankrupts, by a certain indenture dated the 30th of April 1819, and made between the said *John Parkes* of the first part, *John Parkes* the younger, and *Josiah Parkes* of the second part, and the petitioners of the third part, the said *John Parkes* conveyed unto the petitioners, their heirs and assigns, certain freehold estates, the separate property of the said *John Parkes;* and the said *John Parkes*, *John Parkes* the younger, and *Josiah Parkes*, assigned a steam engine and other chattels belonging to the joint estate; and in and by the said indenture the said *John Parkes*, *John Parkes* the younger, and *Josiah Parkes*, jointly and severally covenanted for the payment of the said sum of 18,000*l.*, and all such further sums as they might become indebted to the petitioners; and there was a prior incumbrance on the premises comprised in the said indenture for the sum of 3,000*l.* Shortly after the issuing of the commission, on the 15th of May 1822, Messrs. *Ladbroke* presented their petition in the bankruptcy, stating that the mortgage premises were a very insufficient

1823.

Ex parte LADBROKE. In the matter of PARKES.

security for their debt, and would, when sold, leave them creditors for at least 17,000*l.*, and praying that the mortgaged premises might be valued at 10,000*l.*, and that they, Messrs. *Ladbroke* and Co., might, forthwith, go before the commissioners to prove the sum of 17,000*l.*, in order to vote in the choice of assignees; and that the premises might be sold as in cases of mortgage; and that, in case the premises produced more than 10,000*l.*, that the excess might be carried to the account of the bankrupt's estate; and by an order of the Lord Chancellor, made on the last-mentioned petition, on the 21st of May 1822, it was ordered according to the said prayer. The petitioners, Messrs. *Ladbroke* and Co., accordingly proved the said sum of 17,000*l.* against the joint estate, for monies lent and advanced to the bankrupts, and in their proof excepted and scheduled the said promissory notes for 18,000*l.*, and by virtue of their proof voted in and carried the choice of the assignees. The mortgaged premises sold for 3,521*l.*, and, after satisfaction of the prior mortgage, there remained only 300*l.* applicable to the payment of the petitioners' debt, which would leave the sum of 10,320*l.* 19*s.* 10*d.* to be proved under the commission. Messrs. *Ladbroke* and Co. prayed, by their said petition, that they might be declared entitled to prove the said sum of 10,320*l.* 19*s.* 10*d.* against the separate estate of *John Parkes*, by virtue of his several covenant.

This petition came on to be heard before His Honor the Vice-Chancellor, on the 6th of August 1823, when His Honor was pleased to order that the said Messrs. *Ladbroke* and Co. should be at liberty to prove the sum of 1,000*l.* the remainder of the said promissory notes, against the joint estate of the bankrupts, and the sum of 9,320*l.* 19*s.* 10*d.*, the residue of the whole debt, against the separate estate of *John Parkes*.

1825.

Ex parte LADBROKE. In the matter of PARKES.

Against this order some of the separate creditors of *John Parkes* appealed, and the appeal was argued before the Lord Chancellor in August 1825.

Mr. *Montagu* and Mr. *Glyn* for the appellants.

This was one debt arising upon a balance of a banking account in respect of sums from time to time advanced by Messrs. *Ladbroke* and Co. to the bankrupts, and it cannot be split so as to make it partly proveable against the joint estate, and partly against this separate estate. The order of the Vice-Chancellor seems to shew that he admitted the principle that such a debt could not be so separated, because, by the order, recourse is had to the promissory notes in order to justify the separation of the debt. The debt subsisting when these promissory notes were given, or a great part of it, has been discharged by the subsequent dealings between the parties. There is no authority for separating one entire debt into several debts proveable against different estates, and the proof of the 17,000*l.* as a joint debt, and the consequent command of the choice of assignees, has conclusively given the character of a joint debt to the whole balance due at the bankruptcy. *Ex parte Parminter*, 1 *Ath.* *Ex parte Clowes*, 2 *B. C. C.* 595.

Mr. *Horne* and *Rose* for the respondents. Messrs. *Ladbroke* and Co., denied that this debt could be considered as one debt, and contended that it was divided by the joint securities given for 18,000*l.*, part of the debt.

The LORD CHANCELLOR expressed considerable doubt on the point raised by this petition of appeal.

1826.

Ex parte LADBROKE. In the matter of PARKES. *April* 22, 1826.

The appeal was re-argued on the 11th of March 1826, by Mr. *Horne* and Mr. *Rose* for the respondents, and Mr. *Montagu* and Mr. *Glyn* for the appellants.

The LORD CHANCELLOR thought that the petitioners, Messrs. *Ladbroke* and Co., were entitled to pursue the joint liability of the bankrupts on the promissory notes, to the extent of the amount of those notes, and at the same time to proceed on the several covenants for the residue of the debt.

The Vice-Chancellor's order was affirmed, without costs.

Ex parte SARAH DOWNMAN. — In the matter of THOMAS DOWNMAN and JOHN OFFLEY. *6th April*, 1826.

Where it was agreed, upon a loan to the bankrupt, that six months' notice should be given before repayment was required, and no notice is given before the bankruptcy, the debt is not proveable.

THIS was a petition to be admitted to prove against the separate estate of *Thomas Downman*, by virtue of a promissory note for 400*l.* given by the said *Thomas Downman* to the petitioner, for so much money received by him to the use of the petitioner, and such promissory note was to the following effect: "400*l.* 0*s.* 0*d.* Borrowed and received of *Sarah Downman*, August the twentieth, 1816, four hundred pounds, which I promise to repay with five per cent. interest for the sum. It is agreed that six months notice be previously given before payment is required. *Thomas Downman.*"

Interest was paid on the note up to the 20th August 1822, and this commission issued on the 29th of October 1823.

1826.

Ex parte DOWNMAN. In the matter of DOWNMAN.

The commissioners rejected the proof, on the ground that no notice had been given or demand made before the issuing of the commission.

Mr. *Rose*, for the petition, contended, that this was a present debt, with a postponement of payment, and within the provision of the 49 *G.* 3. *c.* 121. *sec.* 9, or the corresponding section of the 6 *G.* 4. c. 16. *sec.* 51.

Mr. *Glyn*, for the assignees, argued, that the provisions of the statutes referred to, which required a rebate of interest to be made, applied only to debts payable at a future day certain, and were wholly inapplicable to this case, where it was altogether uncertain whether the debt would ever be payable, and where the condition as to the rebate of interest was plainly impracticable.

The VICE-CHANCELLOR held, that as no action would lie for this debt at the time of the bankruptcy, and as this case was not provided for by any statutory enactment, that the petitioner could not be admitted to prove. (*a*)

(*a*) See *Elgar* v. *Mantle*, supra, page 1; *Clayton* v. *Gosling*, 5 *B.* & *C.* 360.

SHALLCROSS *v.* DYSART. (*a*)

May 29, 1826.

Certificate obtained under the Irish bankruptcy Act, 11 & 12 G. 3., not pleadable to an action for a debt contracted in England before the commission issued.

THIS was an action for goods sold, and money had and received, brought in the Common Pleas at Lancaster.

The plea stated the provisions of the Irish bankrupt act, made 11 & 12 *G.* 3. by the Parliament of Ireland. By this act it is, among other things, provided, that the Lord Chancellor of Ireland might, upon the petition of any creditor whose debt amounted to 100*l.* and upwards, issue a commission under which all the real estate of the bankrupt (except copyhold), and all his personal property, might be administered; notice was to be given of the bankruptcy in the Dublin Gazette; the commissioners were to receive the proof of any creditor's debt, who should live remote from the place of meeting, by affidavit, to be made, in case of the creditor's residing abroad, before a magistrate; that every person giving credit upon bills should be entitled to prove; and that the bankrupt conforming should be discharged from all debts by him due or owing at the time he became bankrupt. The plea then stated that the defendant was a merchant in Ireland, and the requisite facts to support the commission against him; that the cause of action accrued before the commission; that the defendant had duly obtained his certificate; and that the plaintiff had due notice of the commission.

The replication stated, that the cause of action accrued in England.

To this there was a demurrer; and it was argued before Mr. Justice *Bayley* and Mr. Baron *Hullock*,

(*a*) Ex relatione Mr. *Parke*.

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SHALLCROSS. v. DYSART.

Justices of C. P. at Lancaster, at the Judges Chambers, 29th May 1826.

Mr. *Parke*, in support of the demurrer. — It is not necessary to inquire into the propriety of the general rule established by the cases, that a contract, made in one country, cannot be discharged by a law binding only on the subjects of another, *Smith* v. *Buchanan*, 1 *East* 6; for in this case the Act of Union, 39 & 40 *G.* 3. *c.* 67, providing that acts in force in Ireland are to continue in force, adopts the Irish Bankrupt Act then in force, and gives it the same effect as if it were re-enacted by the parliament of the united kingdom. The 1 & 2 *G.* 4. *c.* 40, repealing this act in part, continues the remainder; the act therefore is to be considered as an act binding on all the subjects of Great Britain and Ireland, and as if the same provisions were contained in an act of the united parliament; and these provisions are so nearly the same as those relied upon in the Scotch act, in *Sidaway* v. *Hay*, 3 *Barn.* & *Cress.* 12, that the decision must be the same, viz. that all property passes, all creditors are bound by the act, and all debts discharged. The point has never been decided; for *Quinn* v. *Keefe*, 2 *H. Bl.* 553, was not a decision; and *Lewis* v. *Owen*, 4 *B.* & *A.* 654, was founded on a mistake as to the effect of a Scotch discharge.

Mr. *Crompton*, *contra*, relied upon *Smith* v. *Buchanan*. The Act of Union continuing the Irish acts, gives them an operation in Ireland only. It proves their authority there, but does not make them acts of the united kingdom. Since the Union a judgment in Ireland binds Irish lands only. It is a record there, and could have no operation here; and an Irish commission could not affect English lands.

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Bayley J. — It seems to me that the certificate is no bar. The principle is, that the legislature of a country cannot discharge persons except from debts contracted within the limits of their authority. Before the Union the Irish parliament could not bind English subjects as to English debts. *Smith* v. *Buchanan* is a clear authority, substituting Ireland for Maryland. The Act of Union only continues the law in Ireland as it previously stood. The decision of *Sidaway* v. *Hay* went upon the ground that the act of parliament bound both Scotch and Irish subjects; and the only question was as to the meaning of that act.

Hullock B. — It is not necessary to add much. The case is rested upon the 8th article of the Union; the insertion of the provision as to the continuance of Irish acts is *ex abundanti cautelâ*, and the only effect of it is to continue those laws as before.

Judgment for the plaintiff.

Ex parte AINSWORTH. — In the matter of AINSWORTH.

Westminster, May 5, 1826.

Application to suspend the advertisement of the bankruptcy in the Gazette, refused.

THIS was an application, upon a petition to supersede for want of an act of bankruptcy, to suspend the advertisement of the adjudication until the hearing of the petition, which stated, that in the month of March last the petitioner, finding himself unable immediately to meet his engagements, caused a statement of his debts and assets to be drawn out, from which it appeared that the debts owing from the petitioner (including a debt of

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Ex parte AINSWORTH. In the matter of AINSWORTH.

2,100*l.* due to *Walter Vavasour*, payable in seven years from October 1825, by annual instalments of 300*l.* each, and another debt to the said *Walter Vavasour* of 4,800*l.*, payable in sixteen years by half-yearly instalments, but none of which instalments were then in arrear), amounted to 23,664*l.*: that his assets amounted to 26,023*l.*, exclusive of his real estates of the value of 29,000*l.*, and the coal under the same of the value of 11,000*l.*, but which were then mortgaged to secure the sum of 20,000*l.*: that the assets of the petitioner, amounting to such sum of 26,023*l.*, comprised goods, manufactured or in a course of being manufactured, to the amount of 8,000*l.*, for which, owing to the then depressed state of the trade, the petitioner was unable to obtain a market at any price near their value; in consequence of which, with a view to the payment of all his debts and engagements, he proposed to such of his creditors whose debts exceeded the sum of 100*l.* (except the said *Walter Vavasour* and two other creditors) that they should receive payment of their respective debts to the extent of 10*s.* in the pound in goods, and the remainder in money as soon as he could provide for the same; and that nearly all such creditors having acceded to the proposal, the petitioner delivered to them manufactured goods to an amount equal to 10*s.* in the pound on their respective debts, which were invoiced to such creditors as the purchasers thereof, at the fair and current market prices: that a commission was issued against the petitioner by the said *Walter Vavasour* upon the said debt of 2,100*l.*, no instalment of which was then payable or in arrear: that he had been declared bankrupt, but the adjudication had not yet been inserted in the Gazette: that the act of bankruptcy upon which such adjudication was founded was the delivery of goods to the petitioner's creditors as purchasers thereof, in part satisfaction of their respective debts, in the manner and

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under the circumstances above stated: that, in answer to a letter addressed by the petitioner's solicitor to one of the acting commissioners, requesting to be furnished with copies of the depositions, the following answer was received: "I laid your letter before my brother commissioners, and they join with me (and, I may say, with the solicitor to the petitioning creditor) in feeling most anxious, that, previous to our adjudication being made public, you should, on the part of Mr. *Ainsworth*, have the opportunity of getting the opinion of the Lord Chancellor as to the correctness of our decision. Mr. *M.* (who was counsel for the petitioning creditor) requested that I would state to you that he would be most ready to meet you in expediting the matter. He says the Chancellor would hear the petition to-morrow; and the solicitor to the commission will attend with the proceedings at any time, however soon. I therefore trust that no injustice can take place, as there will be no Gazette till Saturday; and in the meantime if we are wrong you can set us right. May 3. 1826."

Mr. *Heald* and Mr. *Rose*, in support of the application, contended that the mere substitution of goods for money in the payment of a debt, when such goods had been received at the current market price, was so clearly not a preference, or in any respect an act of bankruptcy, that the Court would interfere to prevent the irreparable mischief which would follow an advertisement of the petitioner's bankruptcy. They cited *ex parte Foster*, 1 *Rose*, 49; *ex parte Proston*, 1 *Rose*, 259; and *ex parte Fletcher*, 1 *Rose*, 454; and submitted, that from the commissioners' letter it might be inferred that the commissioners had themselves doubts as to the sufficiency of the act of bankruptcy.

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Mr. *Horne* and Mr. *Montagu*, against the application, contended that this was not a case where the Court could interfere. The mode of disposing of his property, coupled with the evidence of insolvency, which was furnished by the petitioner's calling together his creditors, was *prima facie* an act of bankruptcy within the 6 *G.* 4. which did not require that a fraudulent transfer should be by deed. The petitioning creditor had been excluded from any participation in this arrangement, because it was not in his power to arrest his creditor, inasmuch as the debt was not payable for seven years. The only case in which the Court would interpose to suspend the advertisement, was, where it clearly appeared upon the proceedings that there was a want of the legal requisites: if it were even doubtful, the petitioning creditor had a right to his commission.

The LORD CHANCELLOR.

The commissioners have certainly in this case acted with commendable caution in favouring the present application; and if their adjudication had been, upon the face of the proceedings, wrong, I might have ventured to interfere in the present stage; but in that case only. However injurious it may be to the object of the commission, I have no right to prevent the petitioning creditor from proceeding to publication, unless, upon the proceedings, there is clear defect in the requisites to support the commission; and, upon examining the proceedings, I do not find such a case as will authorise my interference.

Application refused. Costs to abide the result of the petition.

Ex parte HIPPINS and HARRISON — In the matter of WILLIAM SIKES, HENRY SIKES, and THOMAS WILKINSON, Bankrupts.

V. C. *April*, 1826.
L. C. *June*, 1826.

At the time of the bankruptcy, Harrison was a creditor of the bankrupts for the sum of 1,500l. on a cash balance, and the bankrupts had in their hands two bills drawn by Harrison on Hippins, for the sum of 1,338l. 7s. 9d., which Hippins had accepted for the accommodation of Harrison, and which Harrison had discounted with the bankrupts, and were not due at the bankruptcy. On the petition of Hippins and Harrison, the Court ordered the bills to be delivered up to Harrison in part discharge of the cash balance, with liberty to prove for the difference.

THE bankrupts carried on the business of bankers in London, under the firm of *Sikes, Snaith*, and Co., and *Harrison* had a banking account with them. Shortly before the 5th of December 1825, *Hippins*, at the request and for the accommodation of *Harrison*, and without consideration, accepted two bills of exchange drawn by *Harrison* on *Hippins* in favour of *Harrison*, one of which bills being for the sum of 625*l.* 3*s.* 1*d.*, dated the 22d of October 1825, and payable four months after date, the other of such bills being for the sum of 713*l.* 4*s.* 8*d.*, dated the 1st of November 1825, and payable four months after date; *Harrison* having indorsed these bills on the 5th of December 1825, discounted them, together with three other bills of exchange, making in the whole the sum of 2,907*l.* 8*s.* 4*d.* with his bankers, *Sikes, Snaith*, and Co., and the amount of those five bills was carried to the credit of *Harrison* in his said banking account, and he was debited with the discount thereof, and between the 5th of December and the bankruptcy *Harrison* drew out considerable sums by checks upon his said bankers. This commission issued against *William Sikes, Henry Sikes*, and *Thomas Wilkinson* on the 21st of December 1825, and the three last of the said five bills had been negociated by the bankers previous to the bankruptcy; but the two first bills so accepted by *Hippins* remained at the time of the bankruptcy in the possession of the bankrupts. At the time of the issuing of the commission a cash balance of 1,500*l.* was due from the bankers

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Ex parte HIPPINS. In the matter of SIKES.

to *Harrison*: after the commission *Harrison* paid the three bills which had been so negociated as aforesaid. This petition by *Hippins* and *Harrison* stated the afore-mentioned facts, and that, notwithstanding, the assignees of *Sikes* and Co. claimed to be entitled to sue *Hippins* on the said two bills so accepted by him, and to negociate the same; and it prayed that the assignees might be restrained from negociating the said two bills which had been accepted by *Hippins*, and from suing him thereon; and that they might be delivered up to *Hippins*, and that the amount of the said two bills and the balance due to *Harrison* might be set-off.

This petition was heard before His Honour the Vice-Chancellor, on the 5th of April 1826.

Mr. *Shadwell* and Mr. *Knight*, for the petition, argued, that the jurisdiction was clear, as the amount of proof could not be ascertained until the question raised by the petition was decided; that if an action had been brought against *Harrison*, he would have had the benefit of a set-off; that he ought to have the same benefit if the action were brought against *Hippins*, inasmuch as *Hippins*, having accepted these bills for the accommodation of *Harrison*, was a mere surety for *Harrison*, and a proceeding against the surety is, in effect, a proceeding against the principal, who must indemnify the surety; that *Hippins* would have obtained this equitable adjustment by bill in equity; and they relied on *ex parte Hanson*, 12 *Ves.* 346; *ex parte Burton*, 1 *Rose*, 320; 1 *Mont. Bl.* 266, note (*a*).

Mr. *Horne* and Mr. *Rose*, for the assignees, contended that the Court had no jurisdiction to give the relief

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sought, upon petition; that there was no authority for the exercise of such a jurisdiction as it respected *Hippins*, who was primarily liable on the bills; that *ex parte Hanson* was a case of a bond, to which very different principles of equitable arrangement as between principal and surety might apply; that it was dangerous to vary the legal liabilities of parties on negociable instruments, by the introduction of equities attaching upon third persons; and that there was no right of set-off at the time of the bankruptcy.

The VICE-CHANCELLOR.

Harrison, being a creditor for a sum of 1,500*l.*, insists that the assignees ought not to proceed against *Hippins* for the recovery of the amount of the two bills accepted by him for the accommodation of *Harrison*, amounting to 1,338*l.* 7*s.* 9*d.*; because the recovery in that action would be substantially to recover the amount from *Harrison*, who will be bound to repay it to *Hippins*. On these two bills *Harrison* is, in effect, the principal debtor, and *Hippins* the surety; and as *Harrison* would have a right of set-off, if the action were brought against him, the assignees were not to be permitted to proceed against *Hippins* for the purpose of defeating that right, but must deliver up those bills to *Harrison* in reduction of the cash balance, leaving him at liberty to prove for the difference. This case is directly within the principle of *ex parte Hanson*. I consider that it makes no difference in the case that *Harrison*, since the commission issued, has paid the three bills negociated by *Sikes* and Co.: I would therefore order the bills to be delivered up.

As to the point of jurisdiction, it is established by the cases on short bills. The true principle is, that if assignees are possessed of property, as property of the

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bankrupt, which is claimed upon equitable grounds by third persons, the Court will, on petition, entertain the question whether such property does or does not form part of the bankrupt's estate.

It was ordered, that the assignees should forthwith deliver up to the petitioner *Hippins* the said two bills of exchange, and that all proceedings against *Hippins* in respect of the said two bills should be stayed.

This order was appealed from, and the appeal was heard before the Lord Chancellor, on the 27th of May 1826.

Mr. *Horne* and Mr. *Rose* for the appellants.

Mr. *Shadwell* and Mr. *Knight* for the respondents.

The case was argued on the same grounds as on the original hearing; and, after the argument, the Lord Chancellor said, that upon looking to the report of the case *ex parte Burton* (*a*), it did not appear to him that in that case the acceptor was an acceptor for accommodation; and that if he was an acceptor for accommodation, that case had been decided with less of consideration than was due to the importance of it, and that he would have the secretary's book examined in order to ascertain that fact. On a subsequent day the Lord Chancellor said, that the case *ex parte Burton* did not bear upon the present question, as, on examination of the secretary's book, it appeared that it was not an acceptance for accommodation; and that in *ex parte Hanson* the party was, on the face of the security, only a surety, and

(*a*) 1 *Rose*, 320.

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June 26, 1826.

that there was no case bearing exactly on the present question.

The LORD CHANCELLOR.

The petition is presented by *Hippins* and *Harrison*, the latter being, at the bankruptcy, a cash creditor of the house of *Sikes* and Co. to the amount of about 1,500*l.* *Harrison* draws two bills, one for 625*l.* 3*s.* 1*d.*, and the other for 713*l.* 4*s.* 8*d.* on *Hippins*. These bills are accepted by *Hippins* for the accommodation of *Harrison*, and were not due at the time when the commission issued. They were carried by *Harrison* to *Sikes* and Co., and though there is some dispute whether they were discounted, or in what other way they were dealt with, the opinion I have formed on the evidence is, that they were discounted: that they were therefore considered as so much cash placed to the credit of *Harrison* in his account with the bankers, *Harrison* being on the other side debited with the amount of the discount. Messrs. *Sikes* and Co. became bankrupts, and this petition is presented in the names of *Hippins* and *Harrison*, praying that such an arrangement may be made as will go to the discharge of these bills, on the ground that otherwise *Sikes* and Co. would call on the acceptor to pay the bills, and the acceptor go against the drawer, who was, as between him and the acceptor, the real acceptor, though not indorsed as such, and by these means he would be deprived of the benefit of his set-off. On the face of the bills, *Hippins*, being the acceptor, was first liable; but the point is, whether *Hippins*, the acceptor, had not a right to call upon *Harrison* to present a petition. If *Harrison* alone had presented the petition, there could have been no objection to the jurisdiction. There are two questions, first, whether the relief sought can be obtained by peti-

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tion in bankruptcy; and, secondly, if this relief could have been reached by a bill in equity, whether, if I can determine on the first question, that it can be obtained in bankruptcy, I must not decide on the same principles as on a bill in equity. I take it, that *Harrison*, keeping an account with *Sikes* and Co., had a clear right to present such a petition, to regulate his proof under the bankruptcy; and the question is, whether the relief which *Harrison* might have is subject to be utterly defeated by the means he has taken in joining *Hippins* with him. I conceive that is not so. If *Harrison* was liable to the bankers on the bills, the consequence of that seems to me to be this, that on the other hand, having a cash demand upon them, he has a right to say, that, as between *Sikes*'s house and himself, the drawer of these bills, the account must be so settled that he may have the benefit of the cash credit. If he has the benefit of this credit as against the bills, the consequence is, that the demand upon the bills is annihilated, both as against himself and the acceptor; and upon the best consideration, therefore, I can give to this case, I think that the order of the Vice-Chancellor is right.

Petition of appeal dismissed: the assignees to take their costs out of the estate.

Ex parte WRIDE. — In the matter of WRIDE.

V. C. *June* 24, 1826.

If a bankrupt be described in the commission as he described himself in carrying on his trade, and according to the popular description of his residence, the commission will not be superseded, because it happens not to be the legal description of his residence.

THIS was the petition of the bankrupt to supersede his commission, on the ground, amongst others, of his mis-description in the commission. In the commission he was described as of the town and county of Kingston-upon-Hull: it appeared upon the affidavits, that the town and county of Kingston-uponHull was always known and described, in popular language, by the name of Hull, and that there adjoined to the legal boundary of the town and county many considerable streets, known also by the common name of Hull, and forming, with it, apparently, one town, which were parts of a parish called Sculcoates; and that the bankrupt resided in a street, one side of which was within the legal limits of the town and county, but the other side, where his residence stood, was in Sculcoates; and that the bankrupt dated his bills of exchange and invoices of goods, and letters in his business, as at Hull, and that he described himself as of Hull in his books of account.

The VICE-CHANCELLOR.

I consider, for this purpose, that Hull, and the town and county of Kingston-upon-Hull, are, in effect, the same expressions; and although the residence of the bankrupt was not within the legal limits of Hull, yet, being within its popular limits, and having constantly described himself in his acts of trading as of Hull, which means the same as the town and county of Kingston-upon-Hull, I cannot consider that there is any mis-description in the commission. If he had been described, as he insists he ought to have been, of the parish of Sculcoates, in the county of York, then, indeed, his creditors would have been misled by a description of which they were ignorant,

V. C. LINC. INN. *June*, 1826.

Ex parte CROSS. — In the matter of CROSS.

Where a debtor is in custody, and a detainer is lodged against him, he is not discharged at law from the detainer until his bail justify, and a judge's order is made for his discharge; and where such detaining creditor proved under a commission against the debtor: Held that an order of Court was necessary for his discharge.

THIS was a petition by the bankrupt to be discharged from a detainer lodged against him at the suit of *John Leigh Brent*, who had since proved his debt under the commission, and for the costs of the application. The bankrupt was a prisoner on the 15th December 1823, when the detainer was lodged against him by *Brent*. On the 18th of the same month, special bail was filed, and not excepted to. *Brent*, conceiving that the bankrupt was then at liberty in respect of his detainer, proved his debt under the commission. On the 10th of March 1824, this petition was presented; and, upon its being served upon *Brent*, the bankrupt was discharged from his detainer. It appeared that the bankrupt was still in custody upon other detainers. The commission issued on the 15th of November 1823, but the adjudication of bankruptcy was not advertised till after the detainer was lodged by *Brent*: the only question now was, as to the costs of the petition.

Mr. *Montagu*, for the bankrupt, insisted that the petition was necessary, as, in consequence of the imprisonment of the debtor, bail put in, and not excepted to, did not operate as a discharge.

Mr. *Rose* for the respondent.

The VICE-CHANCELLOR.

If the bankrupt had not been in custody, then his bail would have been perfected by the creditor's not excepting to them within twenty days; but where the debtor is in custody, he does not obtain his discharge by

the bail not being excepted to; but before he can be discharged, must justify his bail, and have a judge's order for his discharge. When the creditor here proved under the commission, the bail not having justified, the bankrupt was not entitled to his discharge as of course, and the present application was necessary, and the creditor must pay the costs of it.

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Ex parte CROSS. In the matter of CROSS.

Ex parte NICHOLS. — In the matter of NICHOLS.

V. C. LINC. INN. *June* 26, 1826.

A COMMISSION issued against the petitioner, upon the petition of *John Stables*, an attorney, under which he was declared bankrupt. After the adjudication of the bankruptcy, the petitioning creditor's debt, which consisted of the balance of a bill of costs, was reduced by taxation to the sum of 96*l.* 11*s.* 10*d.* The present petition was presented by the bankrupt for a supersedeas.

Bankrupt, who has not surrendered, may sustain a petition to supersede the commission against him, where the petition is presented before the forty-second day.

Mr. *Rose* and Mr. *Ludlow* for the petition.

Mr. *Piggott* against the petition, produced evidence that the bankrupt had not surrendered to his commission; and objected, that under such circumstances, his application could not be heard; and he cited *ex parte Wilkinson.* (*a*)

(*a*) *Ante*, Vol. I. page 587.

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Ex parte NICHOLS. In the matter of NICHOLS.

Against this objection it was urged, that one meeting only had been held under the commission: that after the reduction of the petitioning creditor's debt, the proceedings had been suspended, and he had therefore no opportunity of surrendering, even were a surrender to a commission palpably illegal necessary.

The VICE-CHANCELLOR.

The bankrupt is not bound to surrender till the last public meeting; the objection therefore must not prevent the commission being superseded at the costs of the petitioning creditor.

Ex parte FISHER. — In the matter of BRADLEY.

V. C. LINC. INN. *June* 27, 1826.

In valuing an annuity for proof under a commission, the commissioners since the 6 G. 4. c. 16. s. 54. cannot enter into the consideration of the altered state of the health of the annuitant. Where the consideration for an annuity is not money, but property, the price paid by the grantee for that property is not the criterion of value, provided such value be altered by accidental circumstances, whether general or local, or by improvement of the property.

IN December 1815 *Bradley* assigned a lease for thirty-five years of certain premises to the petitioner, in consideration of 400*l.*: in the year 1817 the petitioner was attacked with a fit of apoplexy, and soon afterwards with paralysis, which materially affected his health, and he was induced to retire into the country to reside; *Bradley*, knowing the state of the petitioner's health, re-purchased the residue of the term of thirty-five years in the said premises, for an annuity of 68*l.* to the petitioner for life, and an annuity of 40*l.* to the petitioner's sister for her life from the time of his death, if she should

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Ex parte FISHER. In the matter of BRADLEY.

survive him; and the said annuities were secured by the bond of *Bradley*, and by a charge upon the rents and profits of the leasehold premises, which were conveyed to trustees for securing the said annuities. In January 1826 a commission issued against *Bradley*, under which the petitioner applied to have the premises sold, and to be admitted to prove for such sum as the commissioners should ascertain to be due in respect of such annuities, after deducting the sum for which the premises should be sold. The commissioners had directed the opinion of an actuary to be taken, and that, in valuing the annuities, he should confine himself to the sum of 400*l.* as the value of the premises at the time the annuities were granted, and deduct therefrom the diminution in value caused by the lapse of time, and would not allow the petitioner to prove upon any other principle: he therefore declined to abide by a valuation made under such restrictions. In the year 1815, when the petitioner purchased the premises, a great scarcity of money prevailed, and an extraordinary depression took place in the value of property, particularly of leasehold property, in consequence of which depression the petitioner had purchased the premises upon very advantageous terms, and the same were, in 1821, when the annuities were granted, much increased in value: the petitioner also was now enjoying a good state of health, and was not under any apprehension of a renewal of those attacks under which he laboured at the time the annuities were granted. The petition therefore prayed, that the value of the annuities might be ascertained; and that in the valuation he might be allowed the benefit of his improved health at the present period, and that the residue of the term of thirty-five years might be sold, and the proceeds applied, so far as they would extend, in payment of the money to be ascertained

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Ex parte FISHER. In the matter of BRADLEY.

by the commissioners to be due in respect of the annuities, with liberty to prove for the deficiency.

Mr. *Whitmarsh* in support of the petition contended, that the commissioners had taken a wrong view of the principle of computing the value of an annuity, in considering themselves as bound under the language of the fifty-fourth section of the new bankrupt act, "to have regard only to the original price given, deducting therefrom such diminution in the value as shall have been caused by the lapse of time, &c. since the grant hereof to the date of the commission," whatever special circumstances might exist, either affecting the original price or beyond the mere lapse of time. *Ex parte Thistlewood* (*a*) shews that the increased value through improvement of health is to be taken into consideration. In *ex parte Whitehead* (*b*) too, though the general rule there laid down by the Lord Chancellor might seem adverse to this mode of computation, yet it is clearly meant not to apply to every special case; for the Lord Chancellor assigns expressly as a reason for his judgment, "as there are not any particular circumstances in this case to affect the price, as it is altered by effluxion of time, and by effluxion of time only, I ought to presume that the value of the annuity is the original sum given, with the variation occasioned by the lapse of time since the grant." The only way in which the present annuity has been affected by effluxion of time is, as in *ex parte Thistlewood*, to make it more valuable.

The VICE-CHANCELLOR.

On referring to the 54th section of 6 *Geo.* 4. c. 16. I am of opinion that the commissioners are not now at liberty

(*a*) 1 *Rose*, 290. (*b*) 1 *Mer.* 127.

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Ex parte FISHER. In the matter of BRADLEY.

to enter into the consideration of the altered health of the petitioner, as in *ex-parte Thistlewood.* The legislature seems to have intended to exclude all such considerations, as leading to endless difficulties and subtilties, and to lay down a general and simple rule. I think, however, that the commissioners, in estimating the value of the leasehold property which was the consideration of the annuities, were not limited by the price paid for it by the petitioner; but that regard should be had to the actual value of the lease at the time of the sale to the bankrupt, provided such value were altered by accidental circumstances, either general or local, or by improvement of the property.

Ex parte SMITH and STRICKLAND. — In the matter of BUNSCOMBE.

V. C. LINC. INN. *June* 28, 1826.

Under special circumstances, the Court refused to order the sale of a which was pledged as a security for a debt, permitting the creditor to prove his whole debt under the commission.

THE petitioners were the executors of *John Willis.* In May 1820 the bankrupt deposited the bond of a debtor to him with *Willis*, as a security for money lent by *Willis* to the bankrupt. This commission issued in November 1824. The petition prayed that the bond might be sold before the commissioners, and the produce of the sale paid to the petitioners in or towards the satisfaction of the debt due to them from the bankrupt; and that if the monies to arise by such sale should not be sufficient to satisfy the whole of such debt, that the petitioners might be at liberty to prove under the commission for the residue. It appeared that the obligor in the bond had left this country and gone to the East Indies; and the assignees suggested, that if the bond were then

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Ex parte SMITH and STRICKLAND. In the matter of BUNECOMBE.

sold it would produce nothing, though, with proper management, it might thereafter prove valuable.

Mr. *Jacob* for the petitioners.

Mr. *Treslove* for the assignees.

The VICE-CHANCELLOR, upon the proposal of the Counsel for the assignees, made an order that the petitioners should be at liberty to prove their whole debt under the commission, and to receive dividends thereon *pari passu* with the other creditors; and that they should also be at liberty to take such proceedings as they might be advised, to compel the payment of the principal and interest due on the said bond; and that the petitioners should account to the assignees for the surplus of what might be recovered on the said bond, if it should, together with the dividends to be received under the commission, exceed the amount of their debt.

V. C. LINC. INN. *June* 28, 1826.

Ex parte SHAW and others. — In the matter of HOWARD and GIBBS.

Where B. purchased an annuity from C., through the agency of the bankrupts, and the consideration money was received by the bankrupts, as agents for C., and placed by them to C.'s account, and they afterwards became bankrupts: held that B. could not prove the consideration paid for the annuities under their commission, unless it were established that the grant of the annuities was merely colorable, contrived for the purpose of obtaining B.'s money in payment of the debt due from C. to the bankrupts.

IN the month of November 1815 *Howard* and *Gibbs* entered into an engagement with the Duke of *Marlborough*, then Marquis of *Blandford*, to raise money for him by way of annuity; and upon the faith of such engagement they advanced to the Duke, between that time and the following month of March, certain sums of money, amounting in the whole to 2,904*l.* In the month of March 1816 the Duke granted two annuities to

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Ex parte SHAW. In the matter of HOWARD and GIBBS.

Mr. *Hawkins* for two sums of 3,000*l.* and 1,200*l.*, and those two sums were received by *Howard* and *Gibbs*, and carried to the account of the Duke, who drew the same out of their hands as his occasions required. The annuities were secured upon certain estates to which the Duke was entitled in reversion after the death of his father; and it was sworn by *Gibbs* that the reversion was considered by him as of the value of 240,000*l.*, and that the prior incumbrances amounted only to 200,000*l.* The annuities were regularly paid by *Howard* and *Gibbs*, as the agents of the Duke, to Mr. *Hawkins*; and in the year 1818, the Duke's father being then dead, and the Duke having conveyed his interest in certain estates to the Honourable *Frederick St. John*, as a trustee for the payment of his debts, Mr. *Hawkins*, by the persuasion of *Howard* and *Gibbs*, and in ignorance of the actual facts of the case, consented to receive a debenture on those estates for the amount of the consideration money paid for the annuities, and the arrears of the annuities then due. Nothing was ever received by Mr. *Hawkins* from this debenture. In 1821 this commission issued against *Howard* and *Gibbs*. In 1822 Mr. *Hawkins* brought an action against *Howard* and *Gibbs*, to recover damages for negligent conduct by them, as his agents, in the purchase of these annuities. In that action Mr. *Hawkins* was nonsuited, and having afterwards moved the Court of Common Pleas to set aside the nonsuit, that action was compromised by *Howard* and *Gibbs* paying 40*l.* for costs, and engaging to assist *Hawkins* in a proof under their commission. Mr. *Hawkins* then applied, and was admitted by the commissioners to prove the sum of 3,377*l.* 7*s.* 1*d.* as money had and received by them to his use, the same being the balance claimed by him in respect of the said two sums of 3,000 and 1,200.

The present petition was to expunge that proof.

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Ex parte SHAW. In the matter of HOWARD and GIBBS.

Mr. *Horne* and Mr. *Treslove*, for the petition, contended, that no demand could be made against the bankrupts in respect of the monies advanced in purchase of the annuities for the benefit of the Duke of *Marlborough*; and that any demand against the bankrupts, for loss sustained through the negligence and misconduct of the bankrupts, rested in damages only, and could not be the subject of proof in bankruptcy.

Mr. *Bickerstith* and Mr. *Rolfe*, against it, submitted, that the fact which appeared upon the examinations, that at the time of granting the annuities there were judgments entered up against the Duke of *Marlborough* to the amount of 480,000*l.*, of which *Gibbs*, as the confidential agent and adviser of the Duke, must have been perfectly aware, was sufficient evidence of fraud to charge the bankrupts with a misapplication of the money. This sum might, but for the bankruptcy, have been recovered at law, *Brown* & *Howard*. (*a*) In that case the statute of limitations alone prevented the recovery of money advanced under circumstances precisely similar. Even there it was considered as a case of such hardship on the plaintiff, that the Court expressly said that they would, if it were possible, get out of the decisions by which they felt themselves reluctantly bound. If it be recoverable by action, it would surely be the subject of proof under a commission, where the equitable circumstances would be taken into account.

The VICE-CHANCELLOR.

In order to support the judgment of the commissioners, that the consideration paid by Mr. *Hawkins* for the annuities granted to him by the Duke of *Marlborough* constituted a proof under the commission of *Howard* and

(*a*) 2 *Brod.* & *B.* 75.

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Gibbs, as for money had and received by them to the use of Mr. *Hawkins*, it would be necessary to establish that the grant of the annuities was a mere colorable transaction, contrived for the purpose of obtaining Mr. *Hawkins*'s money in payment of the debt due by the Duke to *Howard* and *Gibbs*. I am of opinion, that the grant of these annuities was not a colorable, but a substantial transaction; and that whatever reason Mr. *Hawkins* may have to complain of the improvidence and negligence of *Howard* and *Gibbs*, as his agents, in such an investment of his money, and whatever right he might have had to recover the amount of his loss from *Howard* and *Gibbs* in the shape of damages, it cannot be considered that the consideration of these annuities was a debt due from them. If the transaction had, in fact, been colorable only, yet, inasmuch as Mr. *Hawkins*, after the bankruptcy, and with full knowledge of all the circumstances of the case, thought fit to bring an action against *Howard* and *Gibbs* for negligent conduct as his agents in the purchase of the annuities, I strongly incline to think that this action was, as against the creditors of *Howard* and *Gibbs*, an election to adopt the annuities, and would thus defeat his proof under the commission.

V. C. LINC. INN. *June* 29, 1826.

Ex parte ARCHER. — In the matter of ARCHER.

On petition of bankrupt, a surplus being shewn, bankrupt permitted to sue, in the name of one assignee, the other assignee who had been a trustee under a prior trust deed, and who was restrained from setting up his character of assignee.

THE petition of the bankrupt, supported by his affidavit, stated, that being apprehensive of not being able to meet his liabilities, owing to a verdict having been recovered against him by one *Raymond* at the sittings after Michaelmas term 1823, he had applied to *William Morley*, one of his creditors residing in London, for advice and assistance that *Morley* advised the petitioner to assign over all his estate and effects to him in trust for the benefit of his creditors, and a deed for that purpose was accordingly executed by the petitioner in January 1824: that an accountant was sent by *Morley* to King's Lynn, where the petitioner carried on his bussiness as a draper, to take an account of his stock in trade, and of his debts and effects, the result of which shewed that the petitioner's goods and effects amounted to 2,989*l.* 8*s.* 3*d.*, and that he owed the sum of 1,213*l.* 4*s.*, leaving a balance in the petitioner's favour of 1,759*l.* 4*s.*; but that in such account *Morley*'s debt had been stated at 616*l.* 2*s.*, when it in fact amounted to 487*l.* 15*s.* only, so that that the real balance in favour of the petitioner was 1,889*l.* 4*s.*: that *Morley* had sent down a person to assist the petitioner as a shopman, and to take care of the property for *Morley*, as trustee under the assignment; and the money from time to time received in the business was to be remitted to *Morley*, to be divided amongst the creditors: that after the execution of the assignment *Morley* sold goods to the petitioner to the amount of 192*l.* 7*s.*, and the petitioner purchased goods to the amount of 140*l.* and upwards, part of which were paid for by monies subsequently borrowed by the petitioner, and that all of such goods were mixed with the property assigned: that the money received in business by the

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petitioner had been placed in the bank at King's Lynn, and whenever the same amounted to 100*l.*, it was remitted to *Morley*, who had admitted receipts to the amount of 505*l.*; and that out of such sum *Morley* had paid 92*l.* to *Raymond*, the plaintiff in the action: that *Morley* had sent down an auctioneer from London to King's Lynn to sell the stock and effects of the petitioner, although there were more than six respectable auctioneers residing at King's Lynn fully competent for the purpose: that the petitioner's stock had been depreciated by the introduction, without the petitioner's knowledge, of a quantity of damaged goods belonging to *Morley* and the auctioneer: that the auctioneer and his assistants were, for the most part of their stay at King's Lynn, boarded and lodged at the expence of the petitioner: that, after great difficulty, the petitioner obtained an account of the sale of his effects, by which it appeared that they had produced 1,091*l.* 11*s.* 11*d.* after payment of auction duty; and that the expences attending the taking stock, and on the sale, exclusive of the expence of board and lodging as aforesaid, &c. amounted to 463*l.* 1*s.* 3*d.*: that in July 1824 a commission was issued against the petitioner, under which *Morley* and *Coster* were appointed assignees: that the debts proved under the commission amounted to 1,078*l.* 4*s.* 9*d.*: that a dividend of 15*s.* in the pound had been declared: that in the statement delivered by the assignees at the audit meeting, it appeared that, besides the 463*l.* 13*s.* retained by the auctioneer, a further deduction was to be made from the proceeds of the sale of 131*l.* 13*s.* 1*d.*, and 35*l.* 13*s.* 3*d.* as the produce of the goods mixed up with the petitioner's stock by *Morley* and the auctioneer, and paid over by the auctioneer, as was alleged, by mistake, although, as the petitioner believed, such sum of 463*l.* 1*s.* 3*d.* included those two sums, especially the payments made in respect of

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Morley's goods: that in such statement *Morley* had not debited himself with the sum of 505*l.* remitted to him as trustee under the assignment: that the debts due to the estate amounted to 200*l.*, of which 175*l.* was good: that he, the petitioner, had frequently applied to the assignees, to take such measures as might be necessary for investigating the account of the auctioneer, and for compelling payment of the monies received under the sale, or to permit the petitioner to take such measures as he might be advised for that purpose in the names of the assignees, the petitioner offering that they should retain in their hands the balance remaining after payment of the petitioner's debts, and the expences of the commission, for their indemnity, and that such application had been refused; and the petition prayed that the assignees might be restrained from paying the sum of 131*l.* 13*s.* 1*d.* claimed by the auctioneer, and that *Morley* might be removed from being assignee, and that he might be ordered to pay to the bankers to the commission the said sum of 505*l.*, or the sum of 413*l.*, the balance thereof after deducting the said sum of 92*l.*, or the sum of 220*l.* 13*s.*, the balance thereof after deducting the said sums of 92*l.* and 192*l.* 7*s.*: that *Coster*, the other assignee, might be ordered to commence and prosecute an action against *Morley* for the recovery thereof, and against *Morley* or the auctioneer for the recovery of the monies produced by the sale of part of the petitioner's effects; or that the petitioner might be permitted to bring such action as he might be advised, in the name of the assignees, for that purpose.

Morley, in his affidavit, admitted the statement as to the trust deed, the sale of the property, and the charges of the auctioneer, but maintained the necessity of the sale, and the reasonableness of the charges. He also admitted

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the receipt of the 505*l.*, but it was stated that the same had been accounted for, and the balance paid over to himself and his co-assignee under the commission, and that a dividend of 15*s.* in the pound had been paid.

Mr. *Rose*, for the assignee *Morley*, contended that the Court, upon principle, would not allow the bankrupt, without the concurrence of a single creditor, to interfere in the administration of his estate, or remove his assignees, or compel them to account, especially where it was not demonstrated that there was a surplus remaining to him after payment of all his debts, with interest. This rule has been much discussed and fully established in this Court, in the late case *ex parte Shaw*, in the matter of *Howard* and *Gibbs* (*a*), and would not now be departed from.

Mr. *Hart*, for the petitioner, relied on *ex parte Rooth*, *ex parte Langford*, and *ex parte Phillips*, *ante* vol. i. p. 158, in note.

Mr. *Horne* for the assignee *Coster*.

The VICE-CHANCELLOR.

The object of this petition is to remove the assignee, who has clearly an interest hostile to the creditors in general, and who is bound to account. He was the trustee under the trust deed by which all the property was committed to him, and there are other circumstances in his conduct, as alleged, which call for further investigation.

It is true, that to support an application of this sort the bankrupt must shew that he has at least an apparent

(*a*) *Glyn* and *Jam.* Vol. I. page 137.

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interest: in the present case, I think that he has not only shewn an apparent, but a certain interest. When the 505*l.* is accounted for, and the debts and interest paid, there is an actual surplus. I should order the assignee to be discharged, if that were at all necessary for the taking of the accounts, but as it is not, let him be restrained from setting up his character of assignee, and let the bankrupt be at liberty to take such proceedings against him as he shall be advised, in the name of the other assignee, who is to be indemnified: the costs of petition and proceedings to be reserved. *Costs*, the other assignee, to have his costs out of the estate.

V. C. *July*, 1826.

B., one of two assignees, signs the cheques for the dividends, and delivers them to S. his co-assignee, who undertakes to distribute them to the creditors. The cheques are signed by S., and the money is fraudulently received on some of them by a clerk of S. who became bankrupt before the actual demand of the dividends: Held that B. was not liable for the cheques, the credit of S. not being impeached at the time of the delivery of the cheques.

Ex parte GRIFFIN and others. — In the matter of DIXON.

THIS was the petition of a creditor who had proved his debt under the commission, for payment, by one of the two assignees, of his dividends, which had been declared under this commission.

The commission issued in November 1819, and *Brind* and *Shackell* were duly chosen assignees, and the usual assignment executed to them. On the 18th of December 1819 the petitioners proved a debt of 152*l.* 8*s.* 6*d.* which, by payment of one of the bills of exchange which were securities for the debt, was subsequently reduced to 101*l.* 12*s.* 4*d.* On the 17th of June 1820 a dividend of 3*s.* in the pound, and on the 23d of June 1821 a further dividend of 2½*d.* in the pound, were declared, and such dividends amounted to the sum of 16*l.* 6*s.* on the said sum of 101*l.* 12*s.* 4*d.* *Shackell* had become bankrupt; and the petition prayed payment by *Brind* of the

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sum of 16*l.* 6*s.*, with interest at five per cent. from the demand thereof, and the costs of the application.

It appeared by the affidavits in answer, that at the time when the said dividends were declared the assets of the bankrupt were regularly in the hands of the bankers appointed by the creditors in the joint names of *Brind* and *Shackell*. Upon the declaration of the dividends, *Brind* signed cheques upon the bankers, purporting to be the joint cheques of himself and *Shackell*, for the dividend of each creditor, and delivered them to *Shackell*, who undertook to affix his signature, and to distribute the cheques to the creditors as they applied for the same. The creditors were very numerous, and all of them, except the petitioners, and four or five others, whose debts were very small, duly applied for and were paid their dividends: the petitioners delayed their application until April 1824, and at that time *Shackell* had become bankrupt; and it appeared that the cheques for the dividends of the petitioners had been signed by *Shackell*, and deposited by him in a desk, from which they had been fraudulently taken by one of his clerks, and that they had been paid by the bankers.

Mr. *Rose* for the petition contended, that *Brind* was answerable, and that, by surrendering the whole power over the funds to *Shackell*, he had deprived the creditors of the security they had provided, and facilitated the commission of the fraud which had occurred.

Mr. *Agar* for *Brind*.

The VICE-CHANCELLOR.

If the question had been whether *Shackell* was answerable for the amount of these dividends, it might have

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admitted of little doubt; it does not appear that he dealt so providently with these cheques as he ought to have done; whether *Brind* is to be responsible for them is a very different question; it is true that assignees are trustees who have only a joint and not a separate authority; and if by the act of one assignee, out of the course of his duty, the trust property is placed within the single power of the other assignee, there is no doubt but both are liable. Here it was not to be expected that the assignees were to meet, upon the application of every creditor, for the purpose of signing and delivering his dividend cheque. Such a course of proceeding would have been highly inconvenient to the creditors themselves. It is not the practice of bankers to receive the dividend cheques, and to pay to each creditor upon his application; the trouble is greater than they are willing to undertake: of necessity therefore some single person is to be selected for the distribution of these cheques; and it is obvious that there is greater security if one of the assignees will undertake the office than if it be entrusted to an agent, because there may be cases in which circumstances of convenience would not require that the joint cheque should be signed by that assignee until the application of the creditor, and until the time of delivering of the cheque. Upon the whole, I am of opinion that the delivery of these cheques by *Brind* to *Shackell*, as his co-assignee, was an act done in the proper execution of his duty as a trustee, and that he is not responsible for the subsequent loss of these cheques. The delay of the petitioner in his application for the dividend is entitled to consideration; but I think it more useful to rest this case upon general principles.

The case of *ex parte Hodges in re Moore*, which was before the Lord Chancellor on the 30th of November

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1821, was cited on the part of the petitioner as an authority for charging *Brind* with the dividends, but having obtained from the bankrupt office a full statement of that and other petitions connected with it, and which came on to be heard at the same time, I am of opinion that the difference of circumstances makes the case inapplicable.

Ex parte GORE. — In the matter of TURNER.

V. C. LINC. INN. *July* 1, 1826.

Commissioners are to tax bills of costs from time to time, and are not to wait until the whole business of the commission is concluded.

THIS was a petition by one of two assignees for the taxation, by the master, of the solicitor's bill under the commission. The commissioners declined to tax the bill, on the ground that the whole business of the commission not being concluded, if the bill were then taxed a second taxation would be necessary for subsequent business; and that the better course would be to wait until one taxation would conclude the whole matter; and the other assignee adopted the opinion of the commissioners.

Mr. *Roots* for the petition.

The VICE-CHANCELLOR.

I cannot order this solicitor's bill to be taxed by the master. The taxation can only be referred to the master after the bill has been taxed by the commissioners. The notion of the commissioners, that there should only be one taxation under each commission, is plainly opposed to the intention of the legislature in the 14th section of the 6 *G.* 4. c. 16. That section speaks of all

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Ex parte GORE. In the matter of TURNER.

bills for business done under any commission, and not of a single bill; and imports that no payment is to be made to the solicitor for business until his bill for it is taxed. Let the commissioners, therefore, proceed to the taxation of this solicitor's bill.

V. C. LINC. INN. *August* 7, 1826.

Where one partner gives the acceptance of the firm for his separate debt, without authority from his copartner, such acceptance does not bind the firm.

Ex parte GOULDING and DAVIES. — In the matter of O'NEILL and MARTIN.

UPON this petition it appeared, that by charter party dated the 2d of June 1825, between the petitioners and *O'Neill*, it was agreed that the ship Jane should take a cargo of timber from Charlotte Town to Limerick, and there deliver such cargo to the said *O'Neill*, or his assigns; and that he the said *O'Neill* should pay the freight of the said cargo, partly in cash, and the residue, on the delivery of the cargo, in bills at not exceeding four months: that upon delivery of the cargo at Limerick to the consignee thereof appointed by *O'Neill*, the petitioners received, as part payment of the freight, a bill of exchange for 379*l.* 1*s.* 2*d.*, dated at Limerick the 30th of November 1825, drawn by the consignee of the cargo upon the bankrupts jointly, under the firm of *Alan Francis O'Neill* and Co., payable in London to the order of the drawer four months after date, and specially indorsed by the drawer to the petitioners; that on the 4th of December 1825 the petitioners, in the ordinary course of business, received this bill in Liverpool, and early in the business hours of that day, viz., about ten o'clock in the forenoon, left the bill, as was customary,

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at the partnership counting-house of the bankrupts, with the proper partnership clerk, for acceptance, and after the lapse of several hours, viz., about seven o'clock in the evening, in the regular course of business, called at the counting-house, and received it from the hands of one of the partnership clerks, with the following acceptance written thereon: "Accepted at Messrs. *Jones, Lloyd*, and Co., bankers, London. *Alan Francis O'Neill* and Co. Due 2d April 1826." The petitioners admitted that the acceptance was in the hand-writing of *Alan Francis O'Neill*; but this fact was not known to them at the time the acceptance was delivered, and the same was received as the partnership acceptance, without collusion with the bankrupt *O'Neill*, and without any reason to suspect that it was not given by *O'Neill*, with the authority of his partner. On the 25th of February 1826 a commission of bankruptcy issued against *O'Neill* and *Martin*, under which the petitioners tendered their proof upon the bill, which was rejected by the commissioners, on the ground that the petitioners were not entitled to the joint liability. The present petition prayed that the proof might be admitted.

Mr. *Horne* for the petition.

Mr. *Lowndes*, against it, contended, that this bill, being received with a full knowledge that it was for a separate debt of one of the partners, the petitioners could not prove it as a bill given by the firm; and that it was not competent for *O'Neill* under such circumstances to bind the partnership, though the acceptance was in the name of the partnership: and *Ridley* v. *Taylor*, 13 *East*, 175; *Swan* v. *Steele*, 7 *East*, 220; *Wells* v. *Masterman*, 3 *Esp.* 730; *Shirreff* v. *Wilks*, 1 *East*, 48; *Green* v. *Deakin*, 2 *Starkie*, 347, were cited.

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The VICE-CHANCELLOR. (Sir John Leach.)

Ex parte GOULDING and DAVIES. In the matter of O'NEILL and MARTIN.

In this case, the bankrupt *O'Neill*, having contracted a debt with the petitioners, enters into a partnership with the other bankrupt *Martin*. After the partnership the agent of *O'Neill* delivers to the petitioners, in satisfaction of their debt, a bill drawn by him on the firm of *O'Neill* and *Martin*, and such bill was afterwards accepted by *O'Neill* in the name of the firm. It appears that *O'Neill*'s acceptance of this bill was without the authority or privity of *Martin*; and the question is, whether the petitioners, under the circumstances, are entitled to prove the bill against the joint estate of *O'Neill* and *Martin*. For the petitioners it is argued, that there being no fraud on their part, they are entitled to this joint proof. Upon an attentive consideration of the several authorities which have been referred to, I am of opinion, that where one partner gives the acceptance of the firm in payment of his separate debt, without authority from his copartner, such acceptance does not bind the firm, and that the petitioners cannot prove against the joint estate.

Ex parte DUMBELL. — In the matter of DUMBELL.

V. C. LINC. INN. *August* 9, 1826.

Signature of petitioner to the petition, "authenticated by me, James Lowe, solicitor to the petitioner," not a compliance with the order of 12th Aug. 1809.

MR. *HORNE* objected to the attestation, which was in the following words: "Authenticated by me, *James Lowe*, solicitor to the petitioner, in the matter of the petition," as not being within the order, 12th August 1809.

Mr. *Montagu* said, that when the solicitor had not seen the petitioner sign, but was perfectly well acquainted with the hand-writing, it was no uncommon thing to authenticate what they could not literally attest, and it had been approved by the Court in decided cases. In *ex parte Titley* (*a*), the same objection was raised to the word "authenticated;" but the Lord Chancellor overruled the objection, and that decision had received confirmation from Sir *Thomas Plumer*, Vice-Chancellor, in the case of *ex parte Bellott* (*b*), in which case he spoke of *ex parte Titley*, as decisive upon the subject.

Mr. *Horne* said, that both of those cases had been overruled by the Vice-Chancellor in *ex parte Bury* (*c*), which was the latest decision upon the subject.

The VICE-CHANCELLOR said, he had carefully examined all the cases upon the subject, and that his opinion was, "authenticated" had no acceptation within the meaning of the order, and that it could not be received as attestation. *Aug.* 11.

(*a*) 2 *Rose*, 85. (*b*) 2 *Madd.* 259. (*c*) 1819. *Buck.* 393.

V. C.
LINC. INN.
August 11, 1826.

Ex parte HAYNES. — In the matter of DONKIN.

Where the agreement of apprenticeship is concluded, and the apprentice fee is paid, and the apprentice is actually serving under the concluded agreement, and the execution of the indentures has not taken place from mere inattention, the father is entitled to a return of part of the fee, under the 49th section of 6 G. 4. c. 16.

IT appeared by the petition, the facts of which were not disputed, that in the early part of the year 1825 the petitioner had sold to *Donkin* a quantity of bark for the sum of 450*l.*, which became due in the month of September following; a short time previous to which it was agreed between them, that the petitioner's son should be placed with *Donkin* as an apprentice; and that, by way of an apprentice fee, *Donkin* should be allowed to retain, out of the money due to the petitioner, the sum of 150*l.*; and that the petitioner's son should in the first place go to the bankrupt's house upon liking: that the petitioner's son was accordingly placed with *Donkin*, who, in pursuance of the agreement, retained the said sum of 150*l.*; and after the petitioner's son had been some time in the house and service of *Donkin*, it was agreed between him and the petitioner, that proper indentures of apprenticeship should be executed; but that such indentures were casually, and from mere motives of temporary convenience, delayed, and were in fact not executed when the bankruptcy took place. The petitioner had applied to the commissioners to have the benefit of the 49th section of 6 *G.* 4. s. 16.; but his claim was rejected, inasmuch as the petitioner's son had not been actually bound apprentice by indenture: the petitioner therefore prayed, that the petitioner might be declared to be entitled to the 49th section of the said act; and that it might be referred to the commissioners according to the directions therein contained.

Mr. *Heald* for the petition.

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Ex parte HAYNES. In the matter of DONKIN.

Mr. *Kenyon Parker*, for the assignees, did not question the correctness of the petitioner's statement upon his petition; but submitted, that the words of the act could only be applied to cases where the apprentice was bound by indenture.

The VICE-CHANCELLOR considered, that this case was within the 49th section of the Bankrupt Act; and referred it to the commissioners to inquire what sum it would be reasonable to return to the father, having regard to the amount of the sum paid by him as the apprentice fee, and to the time during which the apprentice had resided with the bankrupt previous to the issuing of the commission.

In the matter of HIGGINBOTTOM.

V. C. LINC. INN, *Aug.* 12. 1826.

Interest, in case of a surplus, under the 6 G. 4. c. 16. s. 132., to be calculated on the whole debt up to the first dividend, then upon the principal money unpaid after deducting the amount of the dividend up to the second dividend, and so on.

THE bankrupt's estate had paid twenty shillings in the pound, and a surplus remained. The question was, how the interest payable out of such surplus was to be calculated, the 132d section of 6 G. 4. c. 16. merely enacting, generally, that interest was payable in all debts in the event of a surplus, such interest to be calculated from the date of the commission.

Mr. *Sugden*, for the creditors, contended, that the mode ought to be this — that if, upon a proof of 100*l.*, a dividend of 10*s.* in the pound should be paid at the end of a year, then, out of the 50*l.*, five pounds should be considered as having been applied as interest, and the remaining 45*l.* in deduction of the debt, and so on as in the case of a mortgage.

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In the matter of HIGGINBOTTOM.

Mr. *Horne*, for the bankrupt, submitted, that what originally had been paid as dividend, when it was not certain that there would be any surplus, could not afterwards be said to have been paid as interest.

The VICE-CHANCELLOR said, that by the plan suggested by Mr. *Sugden*, the creditor would be receiving compound interest; and directed that interest should be calculated upon the whole debt up to the time of the first dividend, then the amount of the dividend to be subtracted from the whole, and interest to be calculated upon the reduced principal up to the payment of the next dividend, and so forward.

V. C. LINC. INN. *August* 14, 1826.

Ex parte CASTELL and others. — In the matter of WENTWORTH, CHALONER, and RISHWORTH, and others.

Where two or more, part, but not all, of a larger firm, are partners in a distinct trade, and the aggregate firm becomes bankrupt, and one of the firms be indebted to the other in respect of a dealing arising out of its distinct trade, such debt can be proved by the one firm against the other.

MESSRS. *Wentworth*, *Chaloner*, *Rishworth*, *Rishworth* the younger, and *Hartley*, carried on business as bankers at York, in partnership together. The said Messrs. *Wentworth*, *Chaloner*, *Rishworth*, and *Rishworth* the younger, carried on the business of bankers, in partnership, at Wakefield, and at Bradford, in the county of York. On the 21st of December 1825 a commission issued against the five partners in the York bank. At the date of the commission the said Wakefield bank was indebted to the said York bank in the sum of 110,982*l.* 16*s.* 9*d.*, such balance arising out of dealings between the two firms of the York and Wakefield banks, in respect of their banking

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Ex parte CASTELL and others. In the matter of WENTWORTH and others.

transactions. The petitioners, who were creditors of the York bank, prayed that a proof might be made under the said commission, on behalf of the creditors of the York bank, of the said sum of 110,982*l.* 16*s.* 9*d.*, as against the estate and effects of the said Wakefield banking concern.

Mr. *Hart* and Mr. *Barber* for the petition.

Mr. *Heald* and Mr. *Glyn* for the assignees.

The question was, whether this debt could be proved against the Wakefield bank estate, on the principle of its having arisen in respect of dealings between these distinct trades of bankers within the case *ex parte Ring*, *Cooke*, *Bl.* 534., and the other cases there cited, and sanctioned by *ex parte Sillitoe*, 1 *Glyn* & *Jam.* 373.

The VICE-CHANCELLOR. (*a*)

These three cases are properly referred to the case of *ex parte Sillitoe*. In that case six persons carried on business as bankers, and two of the six also carried on a separate business as ironmongers. The Bank of England were in the habit of discounting bills for the ironmongers, but not for the bankers; and when the bankers were in want of money, the ironmongers raised it for them at the bank, by discount of the ironmongers' bills. All these six persons became bankrupts, and at the time of the bankruptcy the bankers were indebted to the ironmongers, in respect of such discounts,

(*a*) His Honour gave judgment upon this case, and two other similar cases, *ex parte Brenchley* *re Brenchley*, and *ex parte Stroud* *re Eaton*, at the same time.

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in the sum of 8,222*l.* The separate creditors of the ironmongers insisted that their separate estate, which was first applicable to the payment of their separate debts, having been diminished to the extent of this sum of 8,222*l.* by the assistance thus rendered to the bankers, such separate estate ought to be considered as a creditor of the banking estate, and to receive dividends out of that estate on the sum of 8,222*l.*, *pari passu* with the other banking creditors of the bankers. This question first came before me, and I was of opinion that the separate creditors were entitled to the proof they claimed. My decision was appealed to the Lord Chancellor, and was reversed by him; and, according to the printed report of his judgment, he proceeded upon these principles: that the general rule in bankruptcy was, that a partner in a firm against which a commission of bankruptcy issues should not prove a personal debt against that firm in competition with the creditors of the firm, who are in fact his own creditors; and that this general rule admitted of no exception, unless where the partner to whom the firm was indebted carried on a distinct trade, and the debt from the firm was in respect of that distinct trade: that the case of two or more partners carrying on a distinct trade was the same as that of one partner carrying on a distinct trade; and that, although the separate estate of the ironmongers might have proved against the joint estate, if the debt had accrued by a dealing in their trade as ironmongers, yet they could not prove, inasmuch as the separate debt had accrued, not by a dealing as ironmongers, but by loans of money. I concur in all the doctrine which in the printed case is attributed to the Lord Chancellor, except in this proposition, that there is no difference between the case of two or more partners carrying on a distinct trade, and

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the case of one partner carrying on a distinct trade; and as a general rule, one partner cannot prove a personal debt against the joint firm, because the creditors of the joint firm are his creditors, and he would be taking from his own creditors what ought first to be applied in payment of their debts. But where a firm of two or more partners carry on a distinct trade, the creditors of the larger firm are not the creditors of the smaller firm; and consequently, when the firm of two or more prove against the larger firm, they do not prove against their own creditors. Upon this reasoning, I cannot but still doubt whether the smaller firm of two or more is not in all cases entitled to prove against the larger firm, and whether it can make a difference that the debt due to the smaller firm is in respect of a dealing in the way of their distinct trade, or in respect of any other dealing with the larger firm. Consistently, however, with every principle stated in the case of *ex parte Sillitoe*, it does appear to me, in all the three cases in question, the one firm is entitled to prove against the other firm.

In the case of *ex parte Brenchley*, the banking firm, consisting of three, claim to prove against the distilling firm, consisting of two, for advances of money made by the bankers to the distillers; one of the two distillers is not a partner in the banking firm, and if he had been, the advance of money by the bankers is a dealing in the way of their trade.

In the case of *ex parte Stroud* in the matter of *Eaton*, the debt due by the minor firm to the larger firm was in respect of the employment of the surplus monies which the larger firm had in their hands as bankers; the profit of a banker is made by the employment of such surplus monies, and the debt is therefore to be

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considered as due to them in respect of a dealing in their trade.

The case *ex parte Castell* in the matter of *Wentworth* is to be referred altogether to the same principle. The dealing of the one firm with the other was in the way of their trade, and proof is to be equally made by the York firm against the Wakefield firm.

V. C. LINC. INN, *August* 14, 1826.

The right to the allowance vests on the payment of the dividend; and if the bankrupt be then dead, it vests in his representatives.

Ex parte SAFFORD. — In the matter of SAFFORD.

A COMMISSION issued against *Samuel Safford*, in January 1823, under which he obtained his certificate, on the 21st of May, in the same year. In July 1824 the bankrupt died. In June 1826 a dividend of 10*s.* in the pound was declared upon the sum of 7,890*l.* 7*s.* 5*d.*, the amount of the debts proved under the commission, leaving a balance of 638*l.* in the hands of the assignees.

This was a petition by the widow and administratrix of the bankrupt, praying that the assignees might be directed to pay to her, as the personal representative of the bankrupt, the sum of 229*l.* 5*s.* 10½*d.*, being the amount of the allowance of 5*l.* per cent. upon the net produce of his estate.

Mr. *Bickersteth*, for the petition, relied upon *ex parte Trapp*, 1 *Atk.* 207; *ex parte Calcot*, 1 *Atk.* 209, and 3 *Atk.* 814; and *ex parte Grier*, 1 *Atk.* 207. The right vested in the bankrupt on his obtaining his certificate. In the case *ex parte Grier*, the bankrupt had not obtained his certificate, and on that account only was her claim disallowed.

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Ex parte SAFFORD. In the matter of SAFFORD.

Mr. *Piggott*, for the assignees, submitted that there was a distinction between this and the cases cited. In *ex parte Calcott*, the bankrupt's estate had paid a dividend of 10*s.* in the pound (*a*) in his life-time; and in *ex parte Trapp*, not only had the dividend been paid in his life-

(*a*) Upon reference to the case *ex parte Calcott*, in the bankrupt office, it appears that ten shillings in the pound was not paid in the bankrupt's life-time. The order was as follows: —

Whereas *Joseph Calcott*, of Wokingham, in the county of Berks, and *Jane* his wife, did on the 24th day of October last prefer their petition to me, thereby setting forth, that a commission of bankrupt was awarded against the said *John Tyrrell* on the 4th day of July in the year of our Lord 1740, and he was thereupon duly declared a bankrupt, and *Andrew Hope* Esquire, *William Hucks* Esquire, and *Thomas Barry*, were chosen assignees of his estate and effects, and assignments were executed to them accordingly, and the said *Thomas Barry* was then the only surviving assignee; that there had already been raised and paid, out of the said bankrupt's estate and effects, to his several creditors, nine shillings in the pound, and as the petitioners were informed, there would be a further dividend of two shillings in the pound or upwards; that the said bankrupt died on or about the 17th day of July 1754, and the petitioner *Jane* was his only child, and heir at law and administratrix of his estate and effects; that the petitioner, *Joseph Calcott*, on or about the 17th day of January 1751 intermarried with the said *Jane*; that by an act of parliament, passed in the fifth year of the reign of his present Majesty, intituled "An act to prevent the committing of frauds by bankrupts," it was, amongst other things, enacted, "that all and every persons becoming bankrupt, who should in all things conform as by the said act was directed, should be allowed 5*l.* per cent. in case the produce of their estate should be sufficient to pay 10*s.* in the pound; but in case the net produce of such bankrupt's estate should not be sufficient to pay 10*s.* in the pound, then the bankrupt was to have such allowance as the commissioners and assignees should think proper, not exceeding 5*l.* per cent.;" that the petitioners find, upon inspection of the proceedings under the said commission, that 7,000*l.* and upwards was proved under the same; that the said *Thomas Barry*, the assignee, admitted that the bank-

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Ex parte SAFFORD. In the matter of SAFFORD.

time, but the commissioners had actually ordered payment of his allowance, which was only suspended by the bankrupt's death, and the Court therefore ordered it to be paid to his representatives; that the right to the allowance vested only on payment of the dividend during the life of the bankrupt, in which event only it was transmissible to his representatives.

The VICE-CHANCELLOR was of opinion that the right to the allowance vested, not on the bankrupt's obtaining his certificate, but upon the payment of the sufficient dividend. The words of the act are, "if the net produce of the estate shall pay, &c.;" it was not necessary, however, that the bankrupt should be living when the dividend was

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rupt, if living, would be entitled to an allowance by virtue of the said act, having in all things conformed to the same, but as the said bankrupt was dead, submitted whether an allowance could be made to his representatives; and therefore praying I would direct Mr. *Graves*, the clerk to the said commission, to attend with the said commission and the proceedings under the same; and that the petitioners should have such allowance as the said bankrupt, if living, would be entitled unto; and that the further dividend might be postponed until my further order; and that in case the produce of the said bankrupt's estate should be sufficient to pay every creditor ten shillings in the pound, the said *Thomas Barry* might be directed to pay the petitioners *5l.* per cent. pursuant to the said act: Whereupon, all parties concerned were ordered to attend me on the matter of the said petition; and the matter of the said petition coming on to be heard this day accordingly, now, upon hearing the said petition read, and what was alleged by the counsel for the petitioners, and for the assignees, I do declare that the petitioner *Jane Calcott*, who is administratrix of the said bankrupt, is entitled to the like allowance as the said bankrupt would have been entitled unto in case he had been living; and I do therefore order that such allowance, as would have been coming to the said bankrupt if he had been living, be paid to the petitioner *Jane Calcott*, according to the prayer of the said petition.

declared, as, whenever it was declared, the right to the allowance would vest in his representatives. Payment, therefore, was ordered to be made to the petitioner, upon her producing letters of administration.

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Ex parte SAFFORD. In the matter of SAFFORD.

This case was mentioned to the Lord Chancellor; who, after examination of the orders made in the cases cited, confirmed the Vice-Chancellor's decision.

Sept. 6.

Ex parte CHAPPELL and others. — In the matter of WILLIAMS.

V. C. LINC. INN. *August* 20, 1826.

THE petition stated, that on the 4th of March 1826, a commission had issued against *Joseph Williams*, upon the petition of *James Warley Smith*, under which the petitioners had been chosen assignees; that the debt upon which the commission issued was a debt arising out of partnership transactions between the bankrupt and *J. W. Smith*, and was insufficient to support a commission; but that the debts due to the petitioners were sufficient, and had been contracted not anterior to the debt of *J. W. Smith*; and it prayed, that the commission might be proceeded with, and that the debt of *J. W. Smith* might be expunged, and that the petitioners' debts might be substituted.

Held, that under the 6 G. 4. c. 16. s. 18. the debt of the petitioning creditors should be expunged before the application to the Court for the substitution of another debt to support the commission.

Mr. *Montagu* for the petition.

Mr. *Beames*, for the petitioning creditor, contended, that this was not the proper course to be taken under the circumstances. Those who objected to the petitioning creditor's debt should first apply to expunge it under

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6 G. 4. c. 16. s. 18., which provides, that "if after the adjudication the debt of the petitioning creditor or creditors shall be found insufficient, it shall be lawful for the Lord Chancellor, upon the application of any creditor or creditors having proved debts sufficient to support a commission, to order the commission to be proceeded in." It was clear, that they had no right to come here for one object, until they had obtained the other. This Court was not now the place to dispute the sufficiency of the debt; and only in case of the debt being found insufficient by the commissioners could they sustain the other part of the prayer.

The VICE-CHANCELLOR concurred in opinion, that it was the duty of the petitioners first to have gone before the commissioners to have the debt of the petitioning creditor expunged before they came to this Court to have their own substituted.

V. C. LINC. INN. *Aug.* 11. 1826.

Order made under the 79th section of 6 G. 4. c. 16., for a reference to the master to approve of a new trustee in the room of the bankrupt trustee, and for the transfer of the trust funds by the assignees of the bankrupt trustee.

Ex parte SAUNDERS.—In the matter of SYMONDS.

THE petition stated, that *Nathaniel Symonds*, deceased, by his will, dated June 1806, bequeathed to his executors *N. W. Symonds* (the bankrupt), *E. W. Morgan*, and *R. Ward*, or the survivor, &c. 2,000*l.* three per cent. consolidated bank annuities, then standing in his name, upon trust to pay the dividends or proceeds thereof to the petitioner for the term of her natural life, and upon the death of the petitioner to assign and transfer the same to *J. W.*, if he should then have attained the age of 21 years, and if the said *J. W.* should depart this

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life in the life-time of the petitioner, or should die under the age of 21 years, then that the said *N. W. Symonds*, *E. W. Morgan*, and *R. Ward* should transfer the said sum of 2,000*l.* three per cent. consolidated bank annuities unto the said *N. W. Symonds*, for his own use and benefit.

The testator died in 1808, and the 2,000*l.* three per cent. was transferred into the names of *N. W. Symonds*, *E. W. Morgan*, and *R. Ward*, upon the trusts aforesaid. *R. Ward* died, and in June 1824 *N. W. Symonds* was declared bankrupt, and assignees were appointed. The petition prayed, that under the provisions of statute 6 *Geo.* IV. c. 16. s. 79. it might be referred to one of the Masters of the Court to approve of some proper person or persons to be appointed trustee or trustees of the said sum of 2,000*l.* three per cent. consolidated bank annuities; and that the dividends due thereon might be received by such person or persons as the Court should direct; and that the said sum should be transferred into the names of the persons to be approved by the Master; and that such person or persons should execute a declaration of the trusts thereof, the same to be settled by the said Master.

Mr. *Montagu*, for the petition.

Mr. *Glyn*, for the assignees.

Mr. *Skirrow*, for *E. W. Morgan*, the trustee.

The VICE-CHANCELLOR ordered, "that it be referred to the Master in rotation to approve of some proper person or persons to be appointed a trustee or trustees

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of the said sum of 2,000*l.* three per cent. consolidated bank annuities in the room of the said bankrupt; and that the assignees of the said bankrupt be at liberty to attend the said Master on such reference; and that the said *E. W. Morgan*, and the said assignees, should concur in the appointment of such new trustee or trustees; and that they and all proper persons should join in assigning and transferring the said sum of 2,000*l.* bank annuities into the joint names of the said *E. W. Morgan*, and of the person or persons so to be approved by the said Master as aforesaid, upon the trusts of the said will of *Nathaniel Symonds*, deceased; and that the said *E. W. Morgan*, and the person or persons so to be approved as aforesaid, should execute a declaration of the trusts of the said bank annuities; and it was referred to the said Master, to settle and approve such declaration of trust, if the parties differed about the same, and to tax all parties their costs of and occasioned by this application; and that such costs, when taxed, should be raised and paid to the several parties entitled thereto, or to their respective solicitors, out of the said trust stock or sum of 2,000*l.* three per cent. bank annuities.

Ex parte HARRISON. — In the matter of GROVES and LITTEL.

L. C. 1826. *Westminster, April* 21.

Petitioning creditor under a separate commission against A. ordered to exhibit the proceedings under that commission, in order to aid the proof of an act of bankruptcy by A. under a subsequent joint commission against A. and B.

ON the 13th of January 1826, a separate commission issued against *Groves*, under which he was declared bankrupt, and assignees were chosen. On the 11th of February following a joint commission issued against *Groves* and *Littel*, upon the petition of the present petitioner, directed to the same list of commissioners. At the opening, the debt of the petitioning creditor, and the trading and partnership of *Groves* and *Littel*, and also an act of bankruptcy by *Littel*, were duly proved to the satisfaction of the commissioners; but the petitioner was unable to prove an act of bankruptcy against *Groves*. A meeting was held on the 20th of February, for the purpose of taking into consideration whether the petitioner or his solicitor was entitled to examine the proceedings under the separate commission against *Groves*, in order to ascertain the nature of the act of bankruptcy committed by him, and the person who proved the same; at which meeting the solicitor to the separate commission attended with the proceedings, and objected to the commissioners allowing the petitioner or his solicitor any information on the matter in question; and the commissioners divided in favour of such objection. The petition prayed, that the petitioner or his solicitor might be at liberty to inspect the proceedings under such separate commission, or so much thereof as related to the act of bankruptcy; or that the petitioning creditor under such separate commission, or his solicitor, might be ordered to communicate, upon affidavit, the name, residence, and description of the person by whom such act of bankruptcy was proved, and the nature and date of such act of bankruptcy; and in whose custody were

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any written documents, if such were used in evidence for that purpose.

Mr. *Knight* for the petition.

Mr. *Heald*, on behalf of the petitioning creditor under the separate commission, opposed the application. A petitioning creditor is not bound to afford evidence which was to have the effect of overturning his own commission; nor are the proceedings to be laid open to a stranger for purposes hostile to the commission under which they were taken. The petitioner had issued a speculative commission, and the Court would not interfere to furnish him with that fact, of which every petitioning creditor ought to be assured before he takes out a commission.

The LORD CHANCELLOR.

All the requisites have been proved under this joint commission, except the act of bankruptcy against *Groves*, who had recently, as the petitioner knew, been proved to have committed an act of bankruptcy under the separate commission; I cannot therefore call this a speculative commission. If two separate commissions had been taken out, they must both have gone on; but where there is a joint and a separate commission, I will order that to be prosecuted which will be least expensive, and yet attended with the most beneficial effects to the creditors. If the petitioning creditor under the separate commission refuse to bring forward the same evidence which he then produced as to the act of bankruptcy, let the proceedings under such commission be exhibited, for the purpose of adopting the act of bankruptcy proved upon that occasion.

Ex parte HARRISON. In the matter of GROVES and LITTEL.

It was ordered, that the assignees under the separate commission should permit the petitioner, or his solicitor, at any fit or seasonable time, to inspect the proceedings had and taken under the said separate commission, for the purpose of ascertaining the nature of the act of bankruptcy proved under such commission, and by whom the same was proved; and that the petitioners should pay to the said assignees their costs of and occasioned by that petition; but that the said petitioner should be at liberty to make, under the joint commission, such application to the Court as he should be advised with reference to such costs.

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Ex parte BOURNE. — In the matter of BOURNE.

Where a commission is taken out for the purpose of putting an end to an action by the bankrupt against the petitioning creditor, and not for the purpose of its operating as a commission for the benefit of the creditors, it will not be permitted to stand; even though an intention of working it for the legitimate purposes of a commission be afterwards adopted.

THIS was an appeal from the decision of His Honour the Vice Chancellor. The facts of the case, and the judgment of His Honour, are reported *ante*, vol. 1. p. 311. The appeal was argued at great length before the Lord Chancellor, in August, on the same grounds as to the general merits as on the original hearing, and particular objections were also raised against the order (*a*) made by the Vice Chancellor.

(*a*) The order was, that the petitioner should be at liberty to proceed in the action already commenced and mentioned in the petition, or to bring or prosecute such other action or actions at law as he should be advised against *Joseph Bennett*, the petitioning creditor under the said commission, the said *Joseph Bennett* not setting up, on the trial of the said action or actions, the said commission of bankruptcy; and that the costs of the said *Joseph Bennett*, together with the costs of the assignees under the commission aforesaid, and occasioned by that application, should be paid and borne out of the estate and effects of the said *Thomas Bourne*; such costs to be taxed by the Master, in case the parties should differ about the same.

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Mr. *Heald* and Mr. *Rose* for the appellant.

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Mr. *Hart* and Mr. *Seymour* for the respondent.

The LORD CHANCELLOR.

7th *Sept.*

The complaint in this case is, that the commission was taken out by *Bennett* to compel the petitioner to confirm the sale of his printing materials, copyright, &c., and to defeat the action commenced by the petitioner against *Bennett* for the alleged illegal sale of the petitioner's property, and not with any view to the creditors, the sale of all the petitioner's property having been made, and the purchase money received by *Bennett*, before the bankruptcy, so that there could be none of the proper purposes of a commission existing, or any purpose but that of defeating the action; and if that be made out, the question then is, whether such a commission can be allowed to stand? There is much contradictory assertion in the evidence, and there is some inconsistency in *Bennett*'s conduct with respect to the sale of the petitioner's property: *Bennett* states positively that the presses and other materials were his own, though in the hands of the bankrupt, who swears as positively to the contrary. Taking the fact in the most favourable light to *Bennett* — that they were his property, it is singular that they should have been sold, not as his own, but sold by *Bennett*, under the authority of *Bourne* to sell them; which authority, though it might be necessary with respect to the copyright, and for the purpose of precluding *Bourne* from setting up another printing office, by which the copyright might be prejudiced, would not have been necessary with reference to the printing presses, materials, &c., if they were really the property of *Bennett*. I will, however, take the fact at present to be, that in the result of a trial (without

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involving the matter with any questions of order and disposition, which might have arisen, in case the commission proceeded,) it would turn out that they were the property of *Bennett*, though in the possession of *Bourne*. If the question depended on this, whether there was a sufficient act of bankruptcy and trading — (and with respect to the last I think it very doubtful:) there is so much contradiction in the affidavits I think it would have been properly left to the event of a trial at law: but be this as it may, the question still comes back to this, and upon this principle the case must be decided — has this commission been taken out for the sole purpose of putting an end to the action, or, stating it as favourably as I can, has it been taken out for the purpose of putting an end to the action; but with the additional purpose of its operating as a commission? Does it or does it not sufficiently appear upon the evidence before me, that if that purpose had been effectually accomplished by stopping the action, it was not the intention of the parties to proceed with the commission? There are many important points upon which there is so much doubt and contradiction, that if the real question was not of the nature I have stated, it would be necessary to have those points settled in a more satisfactory manner than by the judgment of an individual reading these affidavits, before I could venture to say whether the commission should stand or fall. First, there is the question which I have already alluded to, whether *Bennett* was or was not the owner of the materials sold; then there is a paper signed by *Bourne*, which it is extremely difficult, if not impossible, to view in any other way than as an express authority to *Bennett* to sell the property and the copyright. On the other hand, taking that paper, as I must, as containing a power to sell, it would be necessary, if

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the case rested on these points, to ascertain whether such power of sale was in *Bennett* at the actual time when he took upon himself to sell; and this would depend upon an accurate investigation of all that had taken place after it was so signed by *Bourne*. These, and many other points, extremely proper for a court of law, induce great doubt upon my mind whether the action, had it been prosecuted, would have ended favourably to *Bourne*; and my view of this case might be justly characterized as a very mistaken view, if, upon my single judgment, upon reading these affidavits, I were to say that the result *would* have been favourable to *Bourne*. But, whether the action could have been successfully maintained by *Bourne* or could not have been successfully maintained the real question results to this — what was the purpose with which this commission was issued? And this being determined upon the evidence before me, and which I shall presently state, then what is the principle of law which is to be applied. Throughout nearly forty years, which I have passed in this Court in different parts of it, I have invariably understood, that though the cases uniformly speak of a commission of bankruptcy as a matter of right to the subject, yet it was never maintained within my recollection, that there could not be an abuse of the bankrupt law, and that a commission was to be considered a matter of right, when taken out for no earthly purpose connected with the legitimate objects of a commission; and the various cases to which reference may be had tend to shew that the Court has never considered that a sound discretion was taken away by the language of the 5 Geo. 2, or any other bankrupt statute, that large discretion which had originally been given to the great seal with respect to matters of bankruptcy. If you look at the arrangement which this Court makes in almost every case as to a commission of bankruptcy, you can

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never say that the commission is so much a matter of right, that this Court is not equitably to interfere wherever the interests of the parties affected by the commission require such interference. Take the instance of a commission taken out in 1820, and another taken out against the same person four or five years afterwards upon a subsequent trading; according to the strict law, the creditors taking out the commission in 1820 would have a right to all the subsequently acquired property, until he should have obtained his certificate under such first commission: but if he has been permitted to go into the world as a trader, and to gain credit as such, whatever a court of law might say about the rights of the creditors under the first commission, this Court has said it would support the second commission to this extent — that it would not permit the creditors under the first commission to take that which they could not take without injustice to the creditors under the second, whom they have permitted to deal with the bankrupt as if he had his certificate; and that they should only take that part of the bankrupt's subsequently acquired property which should remain after all the creditors who had been so permitted to deal with him after the first commission should have been paid: that the profits derived by the bankrupt from such subsequent dealings shall belong to the creditors under the first commission; but the debts contracted in his trading, after he secondly engaged in trade with the permission of those creditors, shall be first paid (*a*). Again, this Court will not allow a commission to be taken out upon an old act of bankruptcy, which has been long within the

(*a*) *Ex parte Proudfoot*, 1 *Atk.* 67; *ex parte Bold, Cooke*, 10; 253; *Troughton* v. *Gilley, Amb.* *Everett* v. *Backhouse*, 10 *Ves.* 89. 630; *ex parte Brown*, 2 *Ves.* jun.

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knowledge of the party, as in the case of Mr. *Bowes* (*a*), though the acts of parliament give an express right to any creditor of sufficient amount to issue a commission against a trader who shall have committed an act of bankruptcy, and there is nothing in the acts of parliament to shew that any distinction was meant to be made between an old act of bankruptcy and an act of recent date: by the language of the statutes, it is a matter of right; but this Court considers it an abuse of the bankrupt laws, if the creditor, with knowledge of the trader's having committed an act of bankruptcy, permits him to go on dealing with the world as if he had not committed any act of bankruptcy, and will not permit the creditor to take out a commission upon such an act of bankruptcy, let the language of the statute be what it may. My Lord *Loughborough* stated in that case of *Bowes*, what I am sure I have heard stated in this Court over and over again, long before I had any judicial character in the Court, that if a commission be taken out for some particular purpose, and for that particular purpose only — and it is not necessary for me now to say what would be the law if there was a double purpose, one of which was consistent with the legitimate objects of a commission; — but if it be taken out, as it was in that case, to prevent a suit in equity, and not for the general benefit of the creditors, I should hold, as Lord *Loughborough* then held, that such a commission was an abuse of the great seal, and should not stand. There are, it is true, cases in which it has been held, that though the motive which influenced the party taking out a commission was an extremely bad motive, yet, if the commission was nevertheless intended to operate as a commission for the general benefit of the creditors, the Court would not

(*a*) *Ex parte Bowes*, 4 *Ves.* 168.

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supersede it; but in such cases it must be clear, that though the private motive which mainly influenced the creditor was bad, yet that, the commission having all the legal requisites, the other motive would not authorize the Court to supersede it, because it was for the general benefit of the creditors. In the case of a commission taken out by concert and collusion of the bankrupt, a court of law, following the language of the statute, considers it a good commission, if there be an act of bankruptcy and other legal requisites to support it; yet it has long been settled in this Court, that such a commission, where there is concert and collusion, though it be good at law, cannot stand, because it is not the commission of the creditors, but of the bankrupt himself, and is an abuse of the great seal. Such are the principles upon which this Court has invariably acted, and which may be traced more or less strongly through every decision bearing upon the subject. I think myself, therefore, justified in saying, and bound to say, that if the object of this commission was to stay the action, and not to work the commission as a commission for the benefit of the creditors, this Court will not permit it to stand. And I shall take this opportunity of alluding to a late case, *ex parte Wade* in the matter of *Wade* (*a*), because that case has perhaps been misunderstood. I think it right to state here, that I most entirely abide by the opinion upon which my judgment in that case was given, and if the case came again before me I should pronounce

Ex parte Wade.

(*a*) This petition of the bankrupt to supersede, the circumstances of which are fully stated in the judgment, was heard by the Lord Chancellor in August 1825, on appeal from the order of the Vice-Chancellor, who dismissed the petition in July 1823. — Mr. *Agar* and Mr. *Moore* for the petition; Mr. *Hart*, Mr. *Pepys*, and Mr. *Seymour*, for the assignees and petitioning creditors.

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the same decision. The case was shortly this: — A gentleman of considerable property in Suffolk, who was also a trader, being embarrassed, was advised by his two professional friends, who were in partnership, to make an assignment of his property in trust for his creditors, without at the same time informing him that such an assignment would be an act of bankruptcy. The assignment was executed, and they became trustees; and they proceeded, in execution of the trusts reposed in them, to sell part of the estates assigned. They then turned round upon him and said, this deed which we, your professional advisers, recommended you to execute as a deed for the benefit of your creditors, and under which we have been acting, is an act of bankruptcy. It was considered, however, rather too hazardous to appear themselves in the character of petitioning creditors, since, as trustees acting under the deed, they were themselves bound by it: they therefore induced two persons, a butcher and a baker, to take out a commission, and a commission was taken out upon this deed; and the question was, whether these individuals were not merely and purely instruments in the hands of these trustees? The first operation under the commission was to get a meeting of the creditors to sanction, and who had an interest in sanctioning, all acts done under the trust deed, and to get an indemnity for what they had done under it. Now as this deed was an act of bankruptcy, of course all the sales made under it were void. No notice of this was taken, but those creditors who had taken part of these estates in part payment of their debts were permitted to come in and prove the remainder. Now by the strict letter of the law there is no doubt but these individuals had a full right to the commission as creditors of a trader who had committed an act of bankruptcy, and between whom and themselves there had

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been no concert or collusion. But the question before me was, whether it was not a commission — though connected with the intention of distributing amongst the creditors under it the residue of the property which had not been sold under the trust deed — whether it was not a proceeding which it was the duty of the trustees of management to take care should not take place, and should not have effect, and which the Court had authority in its discretion to say was an abuse of the great seal. I was clearly of opinion it was an abuse of the great seal; and being such, I set aside the commission. I have thought necessary to explain the nature of that case, because it has been much misunderstood. I have thought much upon it while the present case has been before me, and feel no reason to regret the decision which I gave. There is another case which bears some resemblance to the last, and strongly illustrates the same principle, *ex parte Norris* (*a*), which has been reported, where an attorney was instructed to prepare an instrument of a nature which would not have been an act of bankruptcy. He prepared a deed which was an act of bankruptcy, and then retained it as having a lien upon it for the costs of preparing it, and for what was due to him as attorney. Not being able to get his costs in that way, he then procured a commission to be taken out upon that very instrument which he had himself prepared, contrary to the instructions and to the intention of the party. I had no difficulty in superseding that commission, though the deed was an act of bankruptcy, because the object for which it was taken out was not the benefit of the creditors; and it was a use made of a transaction on the part of the creditor himself, which could not have been made of that which he as attorney had been instructed

(*a*) 1 *Glyn* and *Jam.* 235.

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to carry into execution, and which, if drawn according to his instructions, would not have been an act of bankruptcy, and which only he was entrusted to draw and to propose to his client for execution.

Upon the present case, from the evidence before me, and from what has been admitted on all hands by the counsel at the bar, I am of opinion that the order of the Vice Chancellor is an order which cannot be carried into execution. There is nothing of greater importance than that where this Court does not itself decide, but is under the necessity of sending the case to law, care should be taken that it should be sent with due consideration of what can be effected at law, and also that it should be so sent as to be effectual for the purpose of instructing what this Court is to do when it comes back again. The order of the Vice Chancellor proceeds upon a principle which is new, at least in my apprehension, that though a commission be taken out under such circumstances that this Court would not allow it to stand, yet, if the fraudulent purpose can be defeated without superseding the commission, the commission shall be treated as a commission that shall be allowed to stand; that though the commission was never meant to operate as a commission, yet this Court will support it, if by some action you can set the bankrupt right. I apprehend the doctrine of the Court to be, that if a commission be taken out for purposes which have no earthly connection with the legitimate purposes of a commission, the Court will say it is not a commission, and will not deal with it by making these qualified orders, but will declare at once that it shall not stand. But supposing that the order of the Vice Chancellor were put in execution, if the execution of it were practicable, and it turned out that the bankrupt

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were entitled to very considerable relief, and yet the commission were to go on, is it not going a great way to say that all the costs are to come out of the bankrupt's estate?

There is another consideration which this order involves, and which, perhaps, has been passed over in the argument with less attention than it deserved; and that is, supposing it to be quite clear, as we may, that in the case of a personal tort, the right of damages which a bankrupt may have, is not a right which the assignees could enforce, it is still, as far as I can find, an undecided question whether they could recover, in respect of a wrong or tort done to the property (*a*). This is a subject which required much discussion before the Court could safely have acted upon it. I might also have observed, that when the Court takes upon itself to limit persons who take out a commission of bankrupt to fourteen or twenty-eight days, there being no direction in the act of parliament, it is pure matter of sound judicial discretion, exercised for this purpose, that the commission may be secured so as to answer the purposes of a commission, and may not lie over unexecuted, and prevent other persons from having a commission which will be carried into execution. In short, all dealings with commissions proceed on the same principle of sound and wise discretion. The question finally comes to this: let *Bennett*'s right to the property be what it might, whether he was a creditor or not a creditor; let him have an authority to sell or not, taking those questions in any way; let the effect of the contradictory affidavits as to all antecedent questions be what it may, the question still is, was it or was it not the intention of

(*a*) See *Clarke* v. *Calvert*, 3 *Moore*, 96.

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the parties who took out this commission, to carry it into execution as a commission, or was their purpose, and their only purpose in taking it out, to put a stop to the action? It is asserted again and again, in the affidavits, that it was taken out for the benefit of the creditors; but it is not to the assertions of any party I am to look, but to the *res gestæ* — to what has been done, and to the evidence which they have themselves, by their conduct, given me of their own intentions, and upon that I must decide, whether or not this commission was meant to operate as a commission, or merely as an instrument to put a direct end to the action.

The action is brought in Trinity term, and notice of trial is given in that term; there are threats of arrest, and then threats that a commission will be taken out if the action is proceeded in. Now I can easily admit that such a threat of a commission may be made, and a commission thereupon issue; and that it may be consistent with such conduct that the object of the commission is to put a stop to the action, and at the same time to prosecute the commission, with a view to the distribution of the estate amongst all the creditors; and I will not say that a commission with such a double object should not stand: but when we come to look at the whole of the matter, and particularly to the evidence furnished by the respondents themselves, what are we to say to the letter of Mr. *Henning*, the solicitor of *Bennett*? It will be found that he clearly admits that at the time the commission was taken out he was not aware that *Bourne* had any effects beyond those which had been sold and payment for them made to *Bennett*. The commission issued on the 11th of July, the letter is dated the 16th of July, after notice of trial had been given, and the assizes were to be held at

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Dorchester on the 26th of July. The commission is opened, and on the 24th a meeting is held, the only object of which was to execute a provisional assignment, which was obviously done with a view to carry it to Dorchester as an answer to the action. In the meantime there had been a good deal of negociation, and many attempts made to settle matters without any allusion to the commission. Now, let us recur to Mr. *Henning's* letter to *Bourne's* solicitor, dated July the 16th. His words are, "Dear Sir, — I beg to acquaint you that your client, the plaintiff, was yesterday declared a bankrupt, and that notice will appear in the next Saturday's Gazette. After the very large sums which Mr. *Bennett* has paid for Mr. *Bourne*, little short of 4,000*l.*, I should hope and trust no further expense will be incurred, and I should propose to supersede the bankruptcy on your withdrawing the suit altogether. *Bourne* has no effects, I believe, and therefore any further proceedings on either side can only be attended with an expense to the parties carrying them on. May I beg the favour of hearing from you in a post or two, for Mr. *Bennett's* government." Now, this letter being written on the 16th of July, the necessity of hearing from *Bourne's* solicitor in a post or two, was the necessity of having a provisional assignment executed before the 26th, when the assizes were to commence, in case some compromise were not made. What is the fair meaning of this letter? He says, "I would propose to supersede the commission upon your withdrawing the suit altogether." Had the letter stopped there, it might have been consistent with the fact, that the original purpose of the commission was that it should have operation as a commission; but that under the then existing circumstances the commission should not go on, first adopting at that time the purpose

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that it should not operate as a commission, though there might have been a different intention when the commission was taken out; but it does not rest there, for he immediately goes on to say, "*Bourne* has no effects, I believe, and therefore any further proceedings may be attended with expense to the parties carrying them on." Now, I would ask, what possible purpose could Mr. *Henning* — and in this transaction he and *Bennett* are the same — what possible purpose could he have in taking out a commission, with a view to its operating as a commission, against one who had no effects. If he had no effects it never could operate as a commission: what purpose, then, could there be but that of defeating the action; and that is explained by the words in *Henning*'s letter, "I hope and trust no further expense will be incurred, and I propose to supersede the commission upon your withdrawing the action altogether." I do not think it is going too far to say that this, which is stated in this letter, written on the 16th of July, must have been the object with which the commission had been taken out on the 11th of July. It appears that there afterwards was an intention of executing the commission as a commission. Mr. *Henning* states, and indeed it appears from the examination of the bankrupt himself, that it was discovered that he had other property which was distributable under the commission. But the question is not what they meant to do with the commission at a period subsequent to the issuing of it, and to the adjudication of the bankruptcy, but what was their purpose and intention at the time they actually issued it. The adoption of a right purpose afterwards will not destroy the effect of the bad purpose in which it originated. Viewing this case, then, upon the principles which I have always understood as governing this Court, and admitting

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that where a commission is taken out with a motive of defeating an action, but with the intent and purpose of its operating as a commission, the Court would not interfere to supersede such commission, under all the circumstances, I am of opinion that this commission cannot be permitted to stand.

L. C. LINC. INN. *Nov.* 1826.

Ex parte JOHN WACKERBATH, since deceased, assignee of the bankrupts OSBORNE MARKHAM, JOHN HALWETT, JAMES TREBECK, EDWARD GROSE SMITH, and JAMES SETON, creditors by specialty of RICHARD BALDWYN, deceased, on behalf of themselves and all other the creditors of RICHARD BALDWYN - Plaintiffs.

AND

POWELL and others - - - - Defendants.

The creditors of a bankrupt appoint the Bank of England as the place where the estate shall be deposited. A dividend is declared—two of the three assignees sign drafts for the dividends, which they forward to the other assignee for his signature. He also signs them, and receives the money, which he applies to his own purposes. Upon his death a creditor's suit is instituted by the assignees and commission, for the administration of his assets. Held, that the estate of the assignee was not liable, under the statute, to pay 20 per cent. upon the funds misapplied.

THIS cause was heard before his Honour the Vice Chancellor, on further directions, on the 10th day of July 1820, and is reported in *Buck's* Bankrupt Cases, 495. *William Greene* and *Elizabeth* his wife, and *Edward Baldwyn*, three of the defendants in the said suit, and who were interested under the will of the said *Richard Baldwyn*, appealed against such part of the decree of his Honour as referred it to the Master to compute interest on the sum of 1,982*l.* 11*s.* 4*d.*, after the rate of twenty pounds per centum per annum, from the

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29th day of June 1809, the day of the passing of the statute of the 49 *G.* 3. *c.* 120, to the 12th day of June 1812, the day of the decease of the testator *Richard Baldwyn*, and prayed a reversal of so much of the said decree.

Nov. 1825.

Mr. *Agar* and Mr. *Roots*, for the appellants, contended that the commissioners could not sustain a bill for the penalty of 20 per cent.; that if they could not charge him, the assignee, with the 20 per cent. in their own jurisdiction, they could not do it by suit; that the possession of money by the assignees, for the purpose of paying a dividend declared, was an infraction of the statute; and if a creditor chose to say he would have his money, and not a check, it would be no answer for the assignee to say the money was in the bank; that in this case, the creditors, whose dividends had been misapplied, and who were not parties to the suit, were the only persons interested in the action; and that the general body of creditors could not be prejudiced by this misuse of the dividend money.

Mr. *Glyn*, for defendants in the same interest, argued, that by the declaration of dividend the fund to be divided became specifically appropriated to the creditors individually, and thenceforth each portion constituted a debt from the assignee to the creditor, recoverable with interest at five per cent. in case of detainer after demand, and the fund became separated from the general estate of the bankrupt; that in this case the creditors whose dividends are unpaid could not have resorted back to the bankrupt's estate, in case of the insolvency of the assignee; and that the general estate of the bankrupt, which alone was to be protected by the 20 per cent. penalty, was not in this case exposed to any risk, and the penalty must be considered attaching for the protection of the bankrupt's estate only where there is a retainer

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of the general unappropriated funds of the bankrupt before the declaration of dividend; and that on the construction of the estate made by the decree, an assignee would be chargeable in respect of the same sum with the 20 per cent. interest payable to the general estate, and five per cent. interest payable to the individual creditor.

Mr. *Pemberton* for the respondents.

The penalty is not a compensation for risk, but to secure the property; and the funds are to remain in the place of deposit appointed by the creditors, not until the order for dividend, but (*a*) until they are divided amongst the creditors. It cannot be meant, that upon the declaration of dividend the assignees are entitled to withdraw the funds from their place of safe custody.

The LORD CHANCELLOR.

If, after dividend, a debt were expunged on petition, the dividend refunded would form part of the general estate of the bankrupt.

As the Vice-Chancellor considered this case as one of considerable difficulty, I should wish to have an opportunity of examining the case very carefully, before I give my judgment.

The LORD CHANCELLOR.

Nov. 10. 1826.

This is an application principally upon the ground that, under the circumstances of the case, interest has been improperly charged against the estate of a deceased

(*a*) 5 G. 2. c. 30. § 32.

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assignee, at the rate of 20 per cent., and the questi is, whether the appeal which complains of that is well founded. The case is in print, with the reasons given for charging the estate with 20 per cent. It appears, that upon the 23d of September 1799, a commission of bankruptcy issued against two persons of the names of *Cox* and *Heisch*, carrying on trade in partnership; and upon the 8th of October, at a meeting of the creditors, the plaintiff *John Wackerbath*, *B. Wagner*, and *Richard Baldwyn*, were chosen assignees. The usual assignment was made to *Wackerbath*, *Baldwyn*, and *Wagner*, and in that assignment was contained the usual covenant which assignees enter into with the commissioners who make the assignment to them, and under the effect of that covenant it is that the record in this suit contends that the commissioners, or the surviving assignee, are to be considered as specialty creditors upon the estate of the deceased Mr. *Baldwyn*, specialty creditors to the amount of the money in his hands; and the decree, I see, takes that distinction, that with respect to the 20 per cent. with which it charges the estate, they were to be considered as simple contract creditors. *Wackerbath* and *Baldwyn*, the assignees, the other gentleman being dead, in performance of the covenant, from time to time paid into the Bank of England various sums of money, to a large amount in the whole, which came into their hands by virtue of the assignment. Then it appears that *Baldwyn*, at his death, was indebted in the sum of 1,982*l.* 11*s.* 4*d.* for monies received by him to that amount, in respect of the dividends of certain creditors of the bankrupts, and applied to his own use. The question in this case is, what was the nature of the debt which *Baldwyn* owed, and to what extent he could be chargeable with interest, whether at the rate of five per cent., whether at the rate of 20 per cent., or whether

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without interest. The present appeal takes no notice of several points, and which I mention, therefore, for no other purpose than of stating, that upon those points I give no judgment. In the first place whether, under the circumstances, any suit of this sort could be maintained in a Court of Equity, without bringing before the Court those particular creditors who were entitled to aliquot shares in the bankrupt's estate after the dividend was declared, and who, after that dividend was declared, might, prior to the statute, have brought an action themselves against the assignee having that dividend in his hands, or who might, after that act passed, by a petition presented to this Court, have called on him to pay the money to them; whether this suit in this shape could be maintained at all; I pass that over, because there is no complaint in the appeal with respect to the manner in which this demand is made. Another question is, whether this is to be considered as a specialty debt; and the distinction which is taken in the decree, as I understand it, is, that to the extent of the money that was in the hands of the assignee, it may be considered as a specialty debt demandable by the commissioners, who are made plaintiffs. Upon that, also, considering that these were aliquot parts of the general estate, distributed into specific portions for the benefit of particular creditors under the declaration of a dividend, and who might themselves respectively have sued for it, I give no opinion, because there is no appeal upon that ground. There is one other topic which is touched upon in the judgment, that this is to be considered in the nature of a penalty, and the assignee being dead, that his assets could not be chargeable. I take no notice of that point, because it is not the subject of appeal. There is, likewise, some controversy, whether, if the commissioners, by virtue of the act, have a special authority given to

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them, in the first instance, to charge in account with the assignee this 20 per cent. on the money they find in his hands, and if it do not appear that the commissioners have, under the language of any of the acts, authority to charge a personal representative with 20 per cent., there is any such authority; of that, likewise, I take no notice, as there is no complaint of it. The only question, with reference to which this matter is brought before me is, whether, under the circumstances of this case, Mr. *Baldwyn*'s estate was chargeable with 20 per cent. interest. Taking it, therefore, that this record is properly framed; that it is a specialty debt to the extent to which it has been declared to be a specialty debt; and taking it for granted the other points were not points upon which an appeal might be brought, though I mention all these points, for the mere purpose of not having it understood that I have given my assent to all these points as such as ought to be affirmatively decided, I confine myself merely to the question, whether, under the circumstances of this case, the persons who must be, if any, the specialty creditors, namely, the commissioners, could have charged 20 per cent.; or if they did not charge 20 per cent., whether, after the death of the assignee, under the circumstances which I am about to state, this Court could charge 20 per cent. Most of us who remember what passed in this Court prior to the 49 *G.* 3. (*a*), know it was the habit of the Court, where it found a proper case for it, to charge the assignee with five per cent.; and I believe I may venture to say, that it could not be done by petition where the assignee had died, but you must have brought a bill for it. When the 49 *G.* 3. passed, it included the mode of making a dividend; and, connecting the language of it, and of the

(*a*) 49 G. 3. c. 121.

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5 *G.* 2. *c.* 30. *s.* 32. and 33., to which it refers, with the covenant made with the commissioners, the covenant with the commissioners must be understood, as it seems to me, to be a covenant that the assignee should account to the commissioners, and that when the commissioners have ascertained how much in the pound is to be paid to every creditor under the commission, that the covenant requires that the aliquot part shall be ordered to be paid to every creditor under the commission; and accordingly, after the act of the 5 *G.* 2. had passed, and indeed before, under other statutes, the money mentioned in the order of the commissioners was so much regarded as money, after that order, had and received by the assignees for the use of the creditors, and was so far separated from the general estate of the bankrupt, that an action might have been brought against the assignees for that money; in which action, if the money had been retained, a charge was allowed in the nature of a proper compensation for retaining the money, which was no longer part of the general estate of the bankrupt, but had become money paid and received, under the effect of that order, for the particular creditors. Indeed, when that action was taken away, upon a proposition of my Lord *Redesdale* in the House of Lords, a petition was substituted for it; but I apprehend there can be no manner of doubt that immediately after the order made, if the assignee does not pay to that person to whom such an aliquot part is ordered to be paid, that such person might, by petition, in the nature of an action for money had and received for his use, come to the Court and call for the money, and for such interest as according to law he would be entitled to. The 49th of *G.* 3. is a statute to be attended to with reference to this question; it is entitled "An act to alter

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and amend the laws relating to bankruptcy;" and in the 2d section it recites that part of the 5th of *G.* 2. which I have referred to; and reciting that the creditors of bankrupts do not in all cases avail themselves of the power given them by the said recited act (I believe it is an observation one may venture to make without the hazard of contradiction, that most creditors who complain owe the grounds of their complaint to the fact that they do not avail themselves of the act of Parliament made for their relief); and reciting that the aforesaid direction of the said recited act had been in many instances disobeyed by the assignees, who retained the monies in their hands, it enables the commissioners to direct where the monies are to be deposited in case of the default of the creditors; and the 4th section gives authority to the commissioners to charge the assignee, in account, with 20 per cent. in the cases therein mentioned. The 6th section speaks of the case of an assignee who becomes a bankrupt; so that the fourth section relates to an assignee not becoming a bankrupt, and the sixth applies to an assignee becoming a bankrupt. The former of the clauses, looking at the case of an assignee not becoming a bankrupt, charges him with 20 per cent.; the latter, looking to the case of an assignee who has become a bankrupt, does not give a better remedy against the bankrupt, at the suit of the person of whose estate he was assignee, than is given to the other creditors of that person, with this exception only, that in that case the future effects of the bankrupt, who kept the money in his own hands instead of paying it out according to the order of the commissioners, are to be liable, notwithstanding this commission, but to be liable only with lawful interest for the sum, at five per cent. I believe there is no other statute that requires attention upon the

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subject, except the last statute (*a*), which adopts in substance the words of the former statutes, as to directing where the monies arising from the bankrupt's estate shall be deposited; and there is a power given to the commissioners, to direct that the money should be invested in exchequer bills, which existed likewise in the former statute, but in a more restricted form. Then follows the section enabling the commissioners to charge the assignee in account with the 20 per cent., as in the former statute. Now here is a liability to be charged in his account with the commissioners, and it is the commissioners who are required to charge him with 20 per cent. Then comes the section relating to assignees becoming bankrupt, which appears to me to contemplate only the case of persons who are assignees becoming bankrupts, but takes no notice whatever of the case of assignees ceasing to be such by death; and I believe, unless my memory misleads me very much, if an assignee had died, and his executors would not account to the estate, they must have been compelled to account to the estate by a suit in equity. Now I certainly have happened in this case to differ from the decree which has been pronounced. There were several orders of dividend; and there being several orders of dividend, from time to time, as those orders of dividend were made, the orders stated what part of the estate was to be paid to creditor A, creditor B, creditor C, creditor D, and so on. The assignees placed themselves under circumstances in which they were instantly liable to pay those aliquot parts to the creditors, who had an order entitling them to that payment. If they refuse to pay according to that rule, they appear to me certainly

(*a*) 6 G. 4. c. 16. § 101, 102, 103, 104, 105.

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to be liable, because they were indebted to the person in whose favour the order was made,—to be liable to interest by way of damages, for retaining it in their hands; but the question is this, whether they are therefore liable to the particular creditors in whose favour the order was made, and likewise liable to the charge by the commissioners, after the commissioners have made their order, of 20 per cent. upon the sum of money paid into the hands of the assignees for the purpose of paying the creditors, while, as long as the whole of the estate was the estate of the bankrupt undivided, no charge whatever had been made by the commissioners, or I apprehend could have been made by this Court, unless the commissioners had refused, in a proper case, to make the charge. As yet, no charge of that kind has been made. In other words, whether they, the assignees, did not become debtors to the particular creditors in whose favour the order for payment is made, as to the respective portions of that which was the bankrupt's estate, but which ceases to be the bankrupt's estate, as it appears to me, when that order of dividend is made. I do not mean to say, that upon some future occasion, perhaps, if it turned out, for instance, that an order was made to pay a man a sum of money, to which he appeared afterwards not to be entitled, and there was an application to have the proof expunged, and then it had gone back again to the estate of the bankrupt, that order might not then be made under the 49th of the King, or the late statute; but the question with me is, whether the language of the clause, in fair construction, can be said to entitle the creditors, generally, to 20 per cent., or to entitle the commissioners, under the effect of the covenant, to recover for these particular creditors, for each and every of them, the 20 per cent. Upon the best consideration that I can

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give the subject, I cannot find that the Court has any authority to do that in an account against the assets of a deceased assignee. The consequence is, that in my humble opinion this estate can only be charged with five per cent. I think, when the order for dividend separates the particular aliquot parts to be paid to each creditor from the mass of the personal estate of the bankrupt, that the assignees then become debtors to him, and that there is nothing in any of the acts of Parliament authorizing him to ask for 20 per cent. as long as he chooses to leave the money in their hands. I take notice of one circumstance more, without giving any opinion upon it: that these dividends, which have been declared for the benefit of particular creditors, are brought back again, by this decree, into the hands of the commissioners or assignees, as part of the bankrupt's estate, without its being considered how far these particular creditors have or have not any reasonable objection to it, because it is their money.

So much of the Vice-Chancellor's order as directed the computation of interest at 20 per cent. reversed. Interest to be computed at five per cent.

Ex parte PRYCE and others. — In the Matter of CRUSO.

L. C. LINC. INN, *January* 10, 1827.

Commissioners are to proceed upon the commission submitted to them, without reference to the existence of any other commission against the same party.

THE petition stated, that *Badnall*, *Spilsbury*, and *Cruso* carried on business as partners; that on the 18th of December 1826 a commission was issued, on the application of the petitioners, against *Badnall* and *Spilsbury*, under which they were declared bankrupt on the 22d of the same month; that on the 23d of December a commission was, upon the petition of the

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petitioners, issued against *Henry Cruso* alone; that on the 26th of December a meeting was held for the purpose of opening the last-mentioned commission, when the commissioners received the proof of the petitioning creditor's debt, and of the trading and act of bankruptcy, but refused to adjudge the said *Cruso* a bankrupt under such commission, inasmuch as they had, on the same 26th of December, opened a joint commission against *Badnall*, *Spilsbury*, and *Cruso*, which had been issued on the 18th of December; and they adjourned further proceedings under such separate commission until they should have received the directions of the Court, and signed a memorandum to that effect.

The petition then stated, that the joint commission against the three partners was a concerted commission, and was issued for the purpose of impeding the prosecution of the other commission; and it prayed that the commissioners might be directed to proceed under the commission so issued against *Cruso*.

Mr. *Montagu* stated the facts to the Court.

The LORD CHANCELLOR stated his opinion to be, that the commissioners ought to proceed under the several commissions as they might be brought before them, since it was impossible for them to know beforehand which would, in the result, be available.

CASES

IN

BANKRUPTCY.

Ex parte SLY. — In the matter of SLY.

V. C. LINC. INN. *August* 11, 1826.

A creditor for goods sold may prove on a bill for part of the debt, and proceed at law on a bill for the remainder, which he has negociated before the bankruptcy, and taken up after the proof.

THE bankrupt owed *Oxley* 169*l.* and upwards, for goods sold and delivered at different times; for which the bankrupt, previously to his bankruptcy, accepted two bills, one on the 24th of November 1825, at two months, for 78*l.*, and the other on the 2d of January 1826, at two months, for 55*l.* 18*s.* In January 1826, a commission issued against *Sly*, the bill for 78*l.* having previously become due, and been dishonoured. *Oxley*, who was one of the assignees, proved a debt of 109*l.* 19*s.* 2*d.* for goods sold and delivered to the bankrupt, for which he stated he had received no security, except the above-mentioned bill for 78*l.* On the 5th of March 1826, the bill for 55*l.* 18*s.*, which had been negociated, became due, and was paid by *Oxley*, who commenced an action thereon, and arrested the bankrupt. This was a petition by the bankrupt, praying that *Oxley* might be declared to have made his election, and be restrained from further proceedings in the action.

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Mr. *O. Anderdon* for the petition, contended, that as these two bills were given in respect of one debt, arising upon the same course of dealings, the creditor could not split the demand, and come in under the commission for one part, and proceed at law for the other. The whole transaction constituted one debt; and though two bills were given, becoming due at different dates, yet inasmuch as the whole debt might have been proved, he was bound by his election, under the 59th section of the bankrupt act. It was only when the debts were of a distinct nature, that proceeding at law was compatible with proving under the commission. *Ex parte Glover*, 1 *Gl.* & *Jam.* 270. The fact of the one bill being outstanding at the time of proving the other, did not affect the question. *Ex parte Hossack*, *Buck*, 390; *ex parte Moore*, *Buck*, 521; and *ex parte Lobbon*, 17 *Ves.* 334, are conclusive. The debt subsisted in its original form from the moment of the bankruptcy, when it became a matter of certainty that the bill would be returned to him. By permitting such a course of proceeding, it would be competent to any one having bills at different dates to divide their demand; to proceed under the commission, and exercise an influence in obstructing the certificate, which would operate as a bar to his claim at law.

Mr. *Horne*, against the petition, relied on *Watson v. Medex* (*a*) and *Harley v. Greenwood.* (*b*) Proof is only an election as to the debt actually proved or claimed, and does not extend to other debts, though *ejusdem generis*. The bill for which the action is brought, being in circulation at the time, could not have been proved; being returned after the bankruptcy, a distinct debt

(*a*) 1 *Barn.* & *Ald.* 121. (*b*) 5 *Barn.* & *Ald.* 95.

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arose after the proof was made; in respect of which he was warranted in proceeding at law.

The VICE-CHANCELLOR.

As the law now stands, a person cannot prove and proceed at law for the same demand. This petition is presented upon the supposition that the amount proved and the amount sued for are two parts of the same debt. That it was originally one debt upon an account current is clear, and the question now is — does it still remain so? The petitioner was indebted generally for goods sold and delivered, for which he gave two bills. When bills are given, the debt becomes assignable by the mere transfer of the bills; and the creditor, having thus received an assignable debt before the bankruptcy, by parting with one of the bills assigns so much of the debt, and the holder is from that moment the creditor of the bankrupt; and, during the interval of his possessing the bill, is the only one who could prove it. At the time, therefore, that the creditor proved one part of the debt, he had assigned the other, not only in equity but at law. After the bankruptcy, he receives what may be termed a re-assignment; that is, he gets back the bill by payment. He is thus a creditor of the bankrupt upon an entirely new debt; and I must decide, that this is not a proceeding at law for the same demand for which the proof was made. Petition dismissed.

L. C.
LINC. INN. *July* 26, 1826.

Ex parte MOORE and others. — In the matter of SHEATH.

A partner cannot prove against his copartner upon indemnifying the joint estate. Proof not payment.

THIS was an appeal from the decision of the Vice-Chancellor, in *ex parte Smith*, *Buck*, 492; in which his Honour decided that a solvent partner might prove against the separate estate of his copartners, upon indemnifying the joint estate against partnership debts not actually paid.

The petition stated, that in June 1820, *George Smith* had preferred his petition, stating that *Abraham Sheath* and *Challis Sheath* had carried on the business of bankers at different places, and with different persons, and under the different styles or firms following, that is to say: —

Abr. Sheath the elder, *Challis Sheath*, *John Steele*, and *John Wray*,	At Lincoln, under the firm of Sheath, Son, Steele, and Wray.
Abr. Sheath the elder, and *Challis Sheath*,	At Boston, under the firm of Sheath and Son.
Abr. Sheath the elder, *Challis Sheath*, *William Watson*, and *Abr. Sheath* the younger,	At Wisbech, under the firm of Sheath, Son, Watson, and Sheath.
Abr. Sheath the elder, *Challis Sheath*, and *George Smith*, the petitioner,	At Spilsby, under the firm of Sheath, Son, and Smith.

That in July 1814, a commission was issued against *Abraham Sheath* the elder, *Challis Sheath*, *John Steele*, and *John Wray*, under which they were declared bankrupts, and the petitioners were appointed assignees.

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That the firm at Boston was, at the time of the issuing of such commission, indebted to the firm at Spilsby in the sum of 60,257*l.* 16*s.* 8*d.*, which *George Smith*, a member of the Spilsby firm, had proved, and had received dividends to the amount of 17,033*l.* 1*s.* That the debts due from the firm at Spilsby amounted to the sum of 95,644*l.* 18*s.* 11*d.*, and the assets to the sum of 65,823*l.* 15*s.* 9*d.*, including the dividends received upon the debt due from the Boston firm. The particulars of the account were as follows: —

SPILSBY FIRM.

Dr.	£	*s.*	*d.*	*Cr.*	£	*s.*	*d.*
Amount of good debts, at the time of suspending payment - - -	95,664	18	11	Good debts - -	48,790	14	9
				Dividends from the Boston Firm	17,033	1	0
				Deficiency - -	29,841	3	2

of which deficiency of 29,841*l.* 3*s.* 2*d.*, *Smith* alleged that he had already paid, and secured to be paid, 16,668*l.* 17*s.* 3*d.*, and had the further sum of 2,450*l.* applicable to the same purpose. That the separate estate of *Challis Sheath* was nearly exhausted; and that no further, or only a very trifling dividend would be paid thereon; and the commissioners had refused to permit *Smith* to prove against such separate estate, or to prove either one half or one third of such deficiency against the estate of *Abraham Sheath*, after a value had been set upon the future dividends to be received on the debts from *Abraham Sheath* and *Challis Sheath* to the firm of *Sheath, Son,* and *Smith.*

August 10, 1820.

That the petition was heard before His Honour the Vice-Chancellor, who declared, "That the petitioner was entitled to prove against the separate estate of each of the said bankrupts, *Abraham Sheath* and *Challis Sheath*, the amount of what should be

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found due from them respectively on taking the partnership accounts of the late Spilsby concern, indemnifying the joint estate of the said bankrupts against all demands which might be made thereon respectively, on account of the said Spilsby concern, in such manner as the commissioners should think fit." And he ordered that it should be referred to the commissioners, &c.

Mr. *Heald*, for the petition of appeal, contended, that the only right of the partner to prove payments made by him after the bankruptcy of his copartner, was by virtue of Sir *Samuel Romilly's* Act, 49 *G.* 3. *c.* 121. *s.* 8. which enacts, "that any person who shall be surety for, or liable for any debt of the bankrupt, if he shall have paid the debt, or any part thereof in discharge of the whole debt, although he may have paid the same after the commission shall have issued, &c. may prove." By this statute, the right of proof is expressly limited to a creditor who pays the whole debt, or part in satisfaction of the whole debt; but indemnifying the joint estate against proofs which may be made, is neither payment to the creditors of their whole debts, nor part in satisfaction of the whole — events which must take place before the creditors can be deprived of their rights, and the surety be substituted in their place. That, even supposing such a construction of the clause can be permitted in the common case of a principal and surety, it could never extend, in bankruptcy, to the case of a partner, although he was, in equity, a surety; as it was an established rule of the Court, that the joint estate should be applied in payment of the joint debts, and the separate estate of the separate debts; and that if such an indemnity were substituted for actual payment, it would, in effect, be making the separate estate pay

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the joint debts — a consequence to which sufficient attention had not, perhaps, been paid in *ex parte Young* (*a*); and which ought not to be extended to a case not within the words of the statute, and contrary to the regular administration of joint and separate assets; and that the case of *ex parte Ogilvy* (*b*), was a decision which could not be supported.

Mr. *Horne* and Mr. *Montagu* for the respondent *Smith*.

It has been decided in *ex parte Ogilvy*, and the decision is founded on principle, that a partner may prove against the separate estate of his copartner, if he indemnifies the joint estate; that is, if he undertake, to the satisfaction of the Court, to pay any joint creditor who may be entitled to prove. The reason of this is obvious. First, the principle upon which the rule is established, that a partner cannot prove against his copartner, in competition with the separate creditors, until the joint creditors are paid, is not for the benefit of the separate creditors, but of the joint creditors, who may be injured by the partner stopping *in transitu* the surplus of the separate estate, which would be carried over to the joint estate — a very remote contingency for the foundation of such a rule; and which, even if well founded, is rather a question for the reservation of the dividend, than for the right of proof. But, as by indemnifying the estate, the joint creditors are virtually paid, the restraint ought to be removed. Secondly, it would be a great hardship upon the partner to be deprived of his right of proof, because he knows not the extent and nature o outstanding joint demands.

(*a*) 2 *Rose*, 40, and 1 *Montagu on Partnership*, 89. (*b*) 2 *Rose*, 177.

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Thirdly, if the partner were to borrow the money, and pay all the joint debts, he clearly would be entitled to prove, although his only mode of paying the loan might be the dividends which he should receive from the separate estate.

Mr. *Heald*, in reply, renewed his objections, which, he said, were, from the reasoning of Mr. *Horne* and Mr. *Montagu*, confirmed; for it was admitted that the word indemnity was not in the act of parliament; and that the effect of a decision in favour of the respondents would be to make the separate estate pay the joint debts.

The Lord Chancellor, on various days, expressed his opinion of the extreme difficulty with which this case was attended, and, after great deliberation, the judgment was pronounced on the 26th July 1826, as follows:

After the most painful attention, which I have been able to devote to this very difficult case, I am constrained to give my judgment against the petitioner *Smith*. I have tried to think otherwise, but cannot: I cannot get rid of the difficulty which the act of parliament has interposed. That proof may be made by a surety paying after the bankruptcy, is clear; whether he pay the whole debt, or part in discharge of the whole: but I cannot bring myself to think, that this petitioner is within either alternative; or that there has been in this case anything more than payment of part, as part only.

The nature of the petitioner's application to prove, is, when divested of all collateral circumstances, simply this: I desire to prove as a surety, by virtue of the act of parliament; not because I have paid the whole debt, or

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any part in discharge of the whole, but because I have given an indemnity for the debt. Of what consequence is it that he has given an indemnity? The meaning of the act clearly is, that two persons shall not stand upon the proceedings in respect of the same debt; and if the indemnity have not expunged from the proceedings, to all substantial purposes, the name of the original creditor, then the person giving indemnity does not come within the meaning of the act, as a surety or person liable paying the debt, or paying part in discharge of the debt, or making an engagement which is accepted in discharge of the debt. I say, that till indemnity is given, which is accepted by every joint creditor as a discharge of the debt, a partner never can, according to my present notion, be considered as a person liable, paying the debt, or part in discharge of the debt, within the meaning of the act; and till he fills the character there designated, he cannot prove.

Mr. *Montagu* submitted, that that reasoning was not applicable to the separate estate of the partner, against which the petitioner now applied to prove. The petitioner is within the terms of the act as against the partner — against the separate estate; and the distinction of the application of the act to this part of the case, is founded on the rule, that the joint estate is divisible among the joint creditors, and the separate estate among the separate creditors; therefore the petitioner is, in the present case, entitled to prove against the separate estate of his partner.

The LORD CHANCELLOR.

I concur perfectly in the proposition, but cannot get to the same conclusion. Now, as this is my opinion,

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upon the general question submitted for my consideration, the collateral questions arising upon the order of His Honour the Vice-Chancellor will not, as it appears to me, be of much importance, unless the time shall arrive when the petitioner, instead of offering to indemnify, shall actually pay the debts; in which event the consideration how far proof is payment, will become material; upon which subject I have carefully looked through all the decisions.

His Honour has been pleased to say, that proof is payment. Now, with great deference, I doubt whether the expression, that proof is payment, can be correctly used. If, indeed, the money were paid at the moment the proof was made, it might be a question: but in the case of three partners, and one becoming a bankrupt, and another paying the whole debt, that partner's right of proving a moiety of the whole debt against the other partner would be quite clear, if it were clear that proof against the bankrupt partner could produce nothing; for the same equity which exists among them, if they all remain solvent, must be the equity which prevails among them when they become bankrupt; and the difficulty of ascertaining, at the time the bankruptcy takes place, who is solvent and who is not solvent, can never interfere with the substantial rights of the parties. I agree that proof is payment, in so far as it produces payment; but I very much doubt whether it is payment when it produces nothing: it is an expression which may be true in the one sense, but not true in the other.

I am inclined, therefore, to agree with the case supposed by Mr. *Montagu*, that if A. B. and C. are partners, and there is a deficiency of 30,000*l.*, and that if

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C. be wholly insolvent, A. paying the whole of such deficiency is entitled to prove 15,000*l.* against B., B. having the benefit of proof for 5,000*l.* against C. I take it to be clear, that if A. have two partners, and he pay more than his share, and one of his partners is insolvent, that insolvency is a mischief in which the other partner must partake, as well as he who seeks to prove. His equitable right to prove would depend upon this, — that if the accounts of the partnership were taken at that time, and he paid the partnership claims at the moment, there can be no doubt how the case would be if they were all solvent; but supposing that one is insolvent, or runs away, then it is equally clear, that the other two must share the loss between them.

Upon this point, however, there is no necessity for me to do more than to intimate my opinion; as, upon the general question, I am satisfied that the petitioner has not any right to prove, until, according to the express words of the statute, he shall actually have paid the whole debt, or part in satisfaction of the whole. It is, I am aware, an extremely hard case; and I do not make this order, until after a painful but vain struggle to discover that my opinion is erroneous.

By the order bearing date the 6th of September 1826, after reciting the provisions of the 49th Geo. 3. c. 121. s. 8., and that it had been proved in the present case, that the said *George Smith* had not entitled himself to the benefit of such enactment, by reason of his not having paid the said debt in the petition mentioned, or any part thereof in discharge of the whole of the said debt, which by the said petition he sought to prove under the commission, it was ordered, that the order of His Honour the Vice-Chancellor, made in this matter on

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the 10th day of August 1820, on the petition of the said *George Smith*, should be discharged, and the said petition dismissed; and that the claims made by the said *Smith*, against each of the estates of *Abraham Sheath* and *Challis Sheath*, and entered upon the proceedings in pursuance of such order, should be expunged; but with liberty to the said *Smith* to apply to the Court as he should be advised, if before the distribution of the said funds, he should have paid the whole of such sum of 29,841*l.* 3*s.* 2*d.* in the petition mentioned, or any part thereof in discharge of the whole of such sum.

V. C. LINC. INN. *August* 7, 1826.

Ex parte BRENCHLEY and another, Trustees, &c. — In the matter of BRENCHLEY.

A sum covenanted by the husband to be paid when demanded by the trustees, on the request of the wife, is, if demanded before the bankruptcy, proveable.

BY indenture of settlement, executed previous to the marriage of *John Brenchley* the younger and *Mary Harman*, the sum of 3,000*l.* stock, to which the said *Mary Harman* was entitled, and the further sum of 3,000*l.* agreed to be paid by *Thomas* the father of *Mary Harman*, was vested in the trustees upon the trusts therein-after declared of the settlement; and *John Brenchley* the younger and *John Brenchley* the elder jointly and severally agreed with the trustees that they, or one of them, would, after the solemnization of the marriage, on demand made by the trustees, pay the sum of 5,000*l.* and interest at five per cent., from the solemnization of the marriage until the day of payment, to be held upon the trusts of the settlement; and it was declared, that the trustees should not be liable for any

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breach of trust, or accountable for any loss which might arise from permitting the said 5,000*l.* to remain due on the said covenant, so long as they might think proper or expedient, unless they should be requested by the said *Mary Brenchley* to enforce payment of the said sum of 5,000*l.* And it was directed and declared, that after the solemnization of the said intended marriage, the trustees should stand possessed of the said 3,000*l.* three per cent. annuities, and the said sums of 5,000*l.* and 3,000*l.*, upon trust, with the consent in writing of *John Brenchley* the younger and *Mary* his wife, to invest the same as therein mentioned, and to permit the said *John Brenchley* the younger and his assigns, during his life, to receive and take, for his and their own use and benefit, the dividends, interest, and income of the said 5,000*l.*, and of the stocks, funds, and securities, and the dividends, interest, and income of the said 3,000*l.* three per cent. Bank annuities, for his own absolute use and benefit, during the joint lives of himself and his wife, or until he should commit an act of bankruptcy on which a commission should issue; and should, after the bankruptcy, and during the joint lives of the said *John Brenchley* the younger and *Mary* his then intended wife, retain and take the dividends of the same trust monies, stocks, and funds, and stand possessed of the same, upon trust, for the sole use of the said *Mary Brenchley*, so that the same should not be under the controul of, nor subject to the debts of, the said *John Brenchley* the younger.

On the 21st of January 1826, the trustees gave notice to *John Brenchley* the elder and *John Brenchley* the younger, to pay to them the sum of 5,000*l.*, and interest thereon from the day of the marriage, upon the trusts and for the purposes of the settlement.

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On the 18th of February 1826, a commission of bankruptcy issued against *John Brenchley* the elder and *John Brenchley* the younger. The trustees applied to prove the sum of 5,000*l.* and interest; but the commissioners rejected the proof, which the present petition prayed might be admitted.

Mr. *Hart* and Mr. *Ching* for the petition.

Mr. *Shadwell* and Mr. *Montagu* against it.

The law is settled that a marriage bond, to be enforced only in the event of bankruptcy, is void, except for the amount actually received from the wife. This instrument is evidently a fraudulent attempt to elude the law. Had it declared, *totidem verbis*, that the 5,000*l.* should be payable "in the event of bankruptcy," there could have been no question on the subject. The precise effect is produced here. It is clear that no payment was contemplated, except in case of bankruptcy. The trustees are declared not to be accountable for any loss which might arise from the 5,000*l.* remaining in the bankrupt's hands, unless requested by the wife to enforce payment. Thus it rested with the husband, when his bankruptcy became inevitable, to create a debt, by procuring such notice to be given. This, therefore, must be looked upon, not as an absolute settlement, but as a covenant to be enforced only in the event of bankruptcy, and not proveable. *Ex parte Murphy*, 1 *Sch. & Lefr.* 49. *Ex parte Hill*, *Co. B. L.* 251. 8 *ed.* 1 *Cox.* 300. *Ex parte Bennett*, *Co. B. L.* 253. 8 *ed.* *Ex parte Hency*, 1 *Sch. & Lefr.* 46. *In re Meaghan*, 1 *Sch. & Lefr.* 179. *Ex parte Oxley*, 1 *Ball & Bea.* 257. *Gardner v. Shannon*, 2 *Sch. & Lefr.* 228. *Ex parte Hinton*, 14 *Ves.* 298. *Ex parte Alcock*, 1 *Ves. & B.* 179. *Ex parte Taaffe*, 1 *Gl. & J.* 110.

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My construction of the instrument is, that possession of the 5,000*l.* was to be transferred to the wife, in the event of an act of bankruptcy being committed; but the wife's life interest, and the interest of the children, does not depend upon the bankruptcy. The wife is a purchaser by marriage, and her interest arose at the execution of the settlement. It can never be supposed a woman upon her marriage should stipulate for a provision, which she could only receive in the event of her husband's becoming bankrupt.

It was ordered, that the petitioners, as such trustees, should be at liberty to go in under the commission, and prove the said sum of 5,000*l.*, together with the arrear of interest due thereon, either against the joint estate of *John Brenchley* the elder and *John Brenchley* the younger, or against their respective separate estates, as the petitioners should elect, and be paid dividends thereon, rateably with the other joint or separate creditors.

L. C.
LINC. INN.
March 21, 1827.

The Court has jurisdiction to review the quantum allowed by the commissioners to the assignees in passing their accounts; and the jurisdiction is not confined to the principle upon which the allowance is made.

Ex parte ANTHONY. — In the matter of RICHARDS.

THIS was an appeal from a decision of His Honour the Vice-Chancellor. The case and judgment are reported, *ante*, page 55.

Mr. *Horne* and Mr. *Montagu*, for the appellant, contended, that the Court, in its general jurisdiction over

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its officers, the commissioners, was bound to enter into questions of the propriety or impropriety of their allowance to the assignees; if not, even by the Vice-Chancellor's judgment, a case of manifest injustice may be proved, without a possibility of redress. That assignees are justified, in cases of confused or complicated accounts, to call in the aid of an accountant, has never been disputed. It has been urged, as a reason for not allowing the petitioner's charges, that the result is not commensurate with the expence incurred. The result cannot be known until the expence of the investigation has been incurred; and is the contingency of the result to deter assignees from investigating suspicious accounts; which it must do, when it is known, that thereupon must depend the allowance or disallowance of the payments made by them in that behalf.

Mr. *Sugden* and Mr. *Collinson*, in support of the Vice-Chancellor's order, contended, that it lay upon the petitioner to demonstrate the errors in the commissioners' mode of taxation: unless objectionable items are distinctly proved, the Court has no jurisdiction.

The LORD CHANCELLOR.

I cannot but view this case as one of very considerable importance, on account of what is called the principle upon which it was determined in the other Court. There is one consideration, of which this Court should never lose sight in every decision which it makes, viz. what is to be the effect of its determination, not in the existing case alone, but upon subsequent similar cases; that a decision, founded on misapprehension, may not be applied as a principle to cases of the same class which may hereafter arise. The short marginal

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note of the case as reported, is this: "The Court will not review the allowance by the commissioners of the assignees' accounts, except on matter of principle." And that abstract is illustrated by the words of the Vice-Chancellor in his judgment; and his words are here important: "It may be correctly stated," His Honour says, "that the assignees are entitled to the expences necessarily incurred in the examination of the accounts; and the commissioners do not appear to have denied that principle, since they allow the propriety of the charges for the assistance of an accountant, but object to the amount charged. It may be admitted, indeed, for present purposes, that all the expences incurred by the petitioner were necessarily incurred, and that all the allegations in the petition are supported by evidence; still this appeal from the commissioners, not being in respect of any wrong principle of taxation, but from their judgment in the amount to be allowed, cannot be entertained by the Court. They are the competent jurisdiction for settling the accounts of the assignees; and the Court cannot enter into the consideration of the quantum of the allowance made by the commissioners, but only of the principle upon which they have proceeded."

Let us now apply this doctrine to cases which may occur, for I will not say the present is such a case. I take it to be a clear general rule, on the one hand, that assignees cannot shake off from themselves the duty which they have undertaken of doing their best with the accounts, and that they have no right to divest themselves of the troublesome parts of their office, by devolving upon the accountant those duties which they are themselves competent to discharge; and, on the other hand, it is equally clear, that in cases where assignees are not

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able to discharge their duty to the creditors without calling in the aid of an accountant, they are justified in calling in such aid. Suppose, then, the assistance of an accountant to be obviously necessary, and one is appointed by the assignees; and that, either from death or accident, or from the avocations consequent upon more lucrative employment, such accountant is unable to proceed to a completion of his investigation—the same reason will still exist for engaging another to finish his accounts, as did exist, in the first instance, for the appointment of the person who commenced the examination. And yet the doctrine here laid down would extend to this: that if the commissioners were called upon to examine and declare what the assignees should be allowed in respect of these accountants, and they allowed that the expence of the first accountant, who could not finish his task, *was* necessary, but disallowed the charges of the assignees incurred by the employment of the accountant for completing the examination, (the commencement of which they admitted to have been necessary,) and it appearing clear to the Court that they had so admitted the propriety of commencing such examination of accounts, but had disallowed the expences of completing such examination; is it to be said, that this Court would not examine into the propriety of their allowance? Such, I confess, is a new doctrine to me, and not consistent with what, in my apprehension, is the jurisdiction of this Court.

It is said, that in this respect the case resembles a master's report upon a solicitor's bill of costs, or upon the passing of a receiver's accounts. By that, I suppose, it is meant to intimate, that the Court will not examine the taxation of a solicitor's bill, or of the receiver's account which is before the master. This also is a new doctrine to me. It is now a great many years since the

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famous case of *Solomon Fell*'s bill was before Lord *Thurlow*, which occupied the Court so much time, and where the contrary principle was acted upon. The Court will not, indeed, in the first instance, take upon itself to examine and decide upon the master's taxation: there is an intermediate step between the master's taxation and the Court's hearing exceptions to it. A petition must be presented, praying for liberty to except; and in that petition are to be set out the several items in respect of which the petitioner is desirous of filing exceptions, and to which items his objections are to be confined. I well remember that first petition before Lord *Thurlow*, and that it led to a very long, and, I ought not to say, troublesome enquiry, for that is a word which ought never to be used upon the seat of judgment, but certainly, to us who were then at the bar, it was, with respect to the bill of costs, a very long and troublesome enquiry. Lord *Thurlow* was of opinion, that in order to give this Court jurisdiction objectionable items must be produced; but so strongly did that judge feel the necessity, for the purposes of justice, that such a jurisdiction should be entertained, that I recollect his sitting two days, in order to find objectionable items whereupon his jurisdiction might in that case be grounded.

Petition for leave to except, must set out the objectionable items.

This authority leaves me no room to doubt that this Court will, in a proper case, review the taxation of a bill of costs. I am also of opinion, unless we have been wrong for a great many years, or unless I am at liberty to introduce into the Court a new principle, that though it will be extremely cautious in entering into such enquiries as it is by this petition called upon to enter into, and in deciding against the judgment of the commissioners, still, that this Court has jurisdiction in such

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a case, I am bound to declare; and more, that I have no authority to repudiate that jurisdiction, which, on the contrary, I am compelled to sustain, until I am told by a competent authority, that in matters of bankruptcy justice is to be administered in this Court in a manner different from what it has hitherto been administered. If, then, in the present case, the commissioners have not allowed that which they ought to have allowed, I have no doubt that this Court has jurisdiction to enter into that question; at the same time that it feels great reluctance to enter upon such an enquiry, in this respect,—that if the Court must take upon itself the labour of looking through all the affidavits upon the matter; or if, on the other hand, it shall direct a reference to the master, or any other person, for examining these accounts, it is impossible not to foresee this alternative; that the last mode of enquiry will be productive of so much expence, that the matter had better at once be given up, than such expence be incurred; and in the other, that if this Court must take upon itself a duty so onerous, and which might easily be got rid of by disclaiming the jurisdiction, it must necessarily, in the meantime, operate to the delay of some other suitor. Nevertheless, unless some individual can be agreed upon, to whom the case may be referred, and who will take upon himself the trouble of stating what expences had been necessarily incurred by the assignee, and what had not, and this course is the best for all parties, I must, be the labour what it may, read all the evidence myself, and decide in the best manner I can. It is impossible, according to my notions of law, to allow the matter to rest here; at the same time, I agree in what has been urged against the petition, that it is incumbent upon those who impugn the commissioners' judgment, to make it clear to the Court that the commissioners were

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wrong in their disallowing of certain items. All these are circumstances to be looked at by me, and to guide my decision as to the amount to be allowed; but, according to the Vice-Chancellor's rule, no circumstances with respect to amount can be looked at at all. I hold a different doctrine.

His Lordship, after having examined all the affidavits, decided, that upon the merits the commissioners were right; and dismissed the petition of appeal, with costs.

Ex parte BURGESS. — In the matter of BURGESS.

L. C. LINC. INN. *June* 23, 1827.

A devisee for life, who converts the soil into bricks, is not a trader.

THIS was a petition to supersede the commission The petition stated, amongst other things, "that the petitioner had for some years past resided at Rainham, in the county of Kent, and had been in the habit of making bricks from earth dug from a freehold farm called Mackland farm, to which he is entitled, in right of his wife, for the joint lives of himself and his said wife."

The affidavit in support of the petition was as follows: — "That the deponent had for some years resided at Rainham, and had been in the habit of making bricks from earth dug upon a freehold farm called Mackland farm, which was devised by *John Irons*, the father of deponent's wife *Fanny Burgess*, formerly *Fanny Irons*, to certain trustees, and their heirs, upon certain trusts mentioned in the will of the said *John Irons*, but,

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nevertheless, to permit deponent's wife, the said *Fanny Burgess*, and her assigns, to receive and take the rents, issues, and profits thereof, to her and their own use and benefit, for the term of her natural life; and in which claim deponent was advised he was entitled to an estate during the coverture of himself and his said wife."

The affidavit in answer to the petition stated: — "That said bankrupt had for some years past carried on the trade or business of brickmaking at Rainham, in the county of Kent, to a very considerable extent, and occupied, as a brick ground, about ten acres of land; and, for the purpose of such trade or business, had bought all the necessary goods and commodities, as straw and coal ashes, in large quantities, from time to time; and was, as deponent believed, a brickmaker within the spirit and operation of the statute now in force relating to bankrupts. That it was true that said bankrupt was seised of or entitled to an estate for the life of his wife, in Mackland farm, at Rainham aforesaid, as alleged in the bankrupt's affidavit. That deponent was employed by the bankrupt as his clerk, from about the 10th February 1825 to about the 10th January 1826, and that the bankrupt, during all that time, exercised and carried on the trade and business of a brickmaker, to a very considerable extent; and whilst deponent was in his employ, manufactured about two millions of bricks, at the least, and sold some to different persons in London — such bricks, when so manufactured, being of the value of from 35*s.* to 46*s.* per thousand, according to the quality thereof, and did business sufficient in extent to obtain a livelihood thereby; and that the said bankrupt, whilst deponent was in his employ, purchased of Messrs. L. W. & B., of Newcastle-upon-Tyne, between the months of March and July inclusive, in the year

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1825, coal ashes, which were, to deponent's knowledge, used by the said bankrupt in his business of brick-making, and which cost the said bankrupt the sum of 111*l.* 14*s.* 10*d.*, and also of Mr. B. S. of Vauxhall, in the month of April 1825, upwards of 180*l.* worth of coal ashes; and that the bankrupt also afterwards bought of a Mr. *Spurway* upwards of 50*l.* worth of coal ashes and breese, which were all used in the bankrupt's business of brickmaking, and prior to that period, other considerable quantities, as appeared by the bankrupt's books; and that the bankrupt, whilst deponent was so in his employ, also purchased of Mr. B. a farmer of Gillingham, and of Mr. S., a farmer of Lower Rainham, considerable quantities of straw, to the amount of 74*l.* and upwards; and also of one Mr. *Lowden*, divers quantities of straw, coal ashes, and breese, which were, to deponent's knowledge, used by the bankrupt in his said business of brickmaking. That the bankrupt, during the time of deponent's said employment, used about seven or ten acres of land, part of Mackland farm, and then let the remaining part of such farm to different persons as his tenants, being about 200 acres more; and that the bankrupt did, during deponent's said employment, make a very large excavation of, and alteration in, said land so occupied by him, by digging up, and using thereof as one of the materials used in his said business of brickmaking, so as greatly to alter the appearance and character of said land."

The affidavit of the bankrupt in reply stated—"That the only earth from which bricks were made and manufactured by deponent, was dug and raised from the farm called Mackland farm, in which the deponent had an estate for the joint lives of himself and his wife. That he had not, at any time or times theretofore, made or

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manufactured, or caused to be made or manufactured any bricks except from the earth so dug or raised from deponent's said farm; and that all the straw, ashes, breese, and commodities mentioned in the affidavits against this petition, were used by deponent in the making or manufacturing of the said bricks from the earth dug or raised from deponent's said farm, called Mackland farm."

Mr. *Sugden* and Mr. *Montagu* in support of the petition.

It is clear that, under the old bankrupt statutes, this was not a trading, it having been settled in the cases of *ex parte Harrison*, 1 *Bro.* 173. *Parker* v. *Wells*, 1 *Bro.* 178; *ex parte Gallimore*, 2 *Rose*, 427. *Sutton* v. *Weeley*, 7 *East*, 442, that brickmaking on land devised or leased is not a trading, although the buying clay and making it into bricks, by a person who has not any interest in the land, may be a trading. The decisions in these cases are founded upon the principle of the English bankrupt laws, which are confined to traders, and do not extend to landholders. In *Port* v. *Turton*, 2 *Wilson*, 169, Lord Camden says, "From the idea we have of merchandize, the line may be drawn between the land owner and the merchant. One would wonder there could ever have been any doubt about a farmer, for if every buyer and seller was liable to be a bankrupt, many of the first persons in the kingdom might be liable to be so. Whatever the owner of land in fee may do, surely he who rents it may do the same; if the former may be a buyer and seller, and not be liable to be a bankrupt, why may not the farmer be so also? His tilling the land, husbandry, and stock on his farm, are known to every body, yet he seeks his living by buying and selling. The buy-

ing and selling which is within those statutes is to be confined to persons who live by a credit gained on an uncertain capital stock." In *Parker* v. *Wells*, Lord *Loughborough*'s opinion is precisely the same. (*a*)

(*a*) Co. B. L. 8th ed. 57. "I hold that the owner of an estate, where he can avail himself either of the produce of that estate entirely, without the addition of any other materials, or by a mixture of small ingredients, in order to put that produce into such a state as to make it marketable, does not upon that account subject himself to the bankrupt laws. How does he seek to gain his trade of living, which is the phrase? Why, I fancy there is no plain common man in the country that would not immediately answer to that question, he lives of his own; he avails himself of that property which comes to him either by descent or by purchase, but upon his own stock, and by his own industry, raises to himself a profit out of the land; his possessions are open and visible to all the world; the extent, therefore, of his credit, may be measured by it, and the course of his business does not complicate or connect his credit with any other persons. In the case of *Port* and *Turton*, Lord *Camden* was clearly of opinion, that in the instance of the coals, the occupier of the land disposing of those coals, though for the purpose of trade, being the production of the land, and not in the nature of a manufacture, in that sense of the word he is not to be considered as a trader liable to a commission. The case of *Newton* v. *Newton* goes further than the case of *Port* v. *Turton*, being an improvement of the improved produce, after it had gone through, by the addition of foreign materials, two or three processes. In saltworks there is a great deal of manufacture. So in the case of cyder made from a man's own orchard. These are all the manufactured produce of the estate; but the person that has the land, making that profit of his land by the disposition of his produce. Upon the grounds that I have stated, these are all settled cases. But it is said that a brickmaker may be a bankrupt; no doubt, a dealer in alum or coals may be a bankrupt; but the whole depends upon the nature and mode of the dealing. The true distinction is, when the business is only carried on as a mode of enjoying the profits of a real estate, and when it is carried on substantially and independently

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The reasoning is confirmed by the doctrine laid down by Sir *William Blackstone*, in his Commentaries (*a*): and the same principle and authority is extended to other analagous cases; to persons making cyder from their own apples, and to the makers of alum or lime-burners. *Ex parte Ridge*, 1 *Rose*, 316.

The principle of the bankrupt laws in Scotland differs, in this respect, from the bankrupt laws of England. In reviewing the bankrupt laws of England and of Scotland, we shall find this striking distinction between them; that in England the regulations relating to bankruptcy are strictly confined to traders, while in Scotland the bankrupt law includes all ranks of men. (*b*)

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as a trade — it would be an uncommon use of the word, but it is a trade in gross. The other is connected with the means of enjoying the estate by a mode of making profit of it. The man's situation, the extent of his credit, and the line of his dealing, are all to be measured by his real property, and not by the course of his dealings."

(*a*) Vol. ii. p. 474. "In mercantile transactions, the case is far otherwise. Trade cannot be carried on without mutual credit on both sides; the contracting of debts is, therefore, here not only justifiable, but necessary. And if, by accidental calamities, as by the loss of a ship in a tempest, the failure of brother traders, or by the nonpayment of persons out of trade, a merchant or trader becomes incapable of discharging his own debts, it is his misfortune and not his fault. To the misfortune, therefore, of debtors, the law has given a compassionate remedy, but denied it to their faults; since, at the same time that it provides for the security of commerce, by enacting, that every considerable master may be declared a bankrupt, for the benefit of his creditors, as well as himself, it has also, to discourage extravagance, declared, that no one shall be capable of being made a bankrupt, but only a trader; nor capable of receiving the full benefit of the statutes, but only an industrious trader."

(*b*) See *Bell*'s Law of Bankruptcy. Intr. 43. 46. 49. — The illustration of this difference is naturally the first

Such was the old law.

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But it will be contended, that by the new statute the law is altered. The words of section 2. are: "all persons using the trade of merchandize by way of bargaining, exchange, bartering, commission, consignment, or otherwise, in gross or by retail; and all persons who, either for themselves, or as agents or factors for others, seek their living by buying and selling, or by buying and letting for hire,

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point of the contrast, and it will be found to elucidate, in some degree, the spirit and genius of the common law of either country.

But it was not to be expected that a system which so completely outraged that law, in particulars so important, would be suffered by Englishmen to reach beyond the range of necessity, which gave it birth. And thus, although by the first statutes of bankruptcy in Henry the Eighth's reign, the commission was not restricted, but made applicable to all ranks of men — when the law came to be renewed, in the 13th year of Queen Eliz. it was limited to merchants; and other persons were left to the rules of the common law, neither restrained by the energy, nor favoured with the indulgence of this peculiar code. It has in this way happened that in England no system of equal rights has been devised for the creditors of those unconnected with trade; there is no restraint upon the diligence of individual creditors; there is no limit to the accumulation of expence; and the debtor is exposed to that continual imprisonment which the notion of its being a satisfaction for debt necessarily implies. The circumstances of Scotland, and the spirit of her common law, have been more favourable to the establishment of such regulations for insolvency as were universal in their application to all ranks of men. Our forefathers felt not that dread of the civil law by which the English barons were actuated. The English code of bankrupt laws was, from its first institution, intended to form a complete body of regulations for the insolvencies of traders. The Scottish has grown up after a very different fashion.

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or by the workmanship of goods or commodities, shall be deemed traders liable to become bankrupt: provided that no farmer, grazier, common labourer, or workman for hire, receiver general of the taxes, or member of or subscriber to any incorporated commercial or trading companies, established by charter or by or under the authority of any act of parliament, shall be deemed as such a trader liable by virtue of this act to become bankrupt."

It has been contended, in a case lately argued before Sir *John Leach*, when Vice-Chancellor, and since before the present Vice-Chancellor, (*ex parte Liddard*,) that a brickmaker was included in the words, "workmanship of commodities;" but Sir *J. Leach* expressed his decided opinion, that such words did not extend to a brickmaker; and the present Vice-Chancellor (Sir *Anthony Hart*) expressed his opinion, that the law was as it existed before this act passed, viz. that devisees or lessees are not traders. That this is the true construction of the act will appear by a reference to the 2d sect. of the 5 Geo. 4. ch. 98. which was an act entitled "An act to consolidate and amend the bankrupt laws." It passed on the 21st June 1824, but was in operation only one day, as by the 133d sect. it was provided, that the act should not take effect before the 1st May 1825; and on the 2d May 1825 it was repealed by the present bankrupt act. But the 2d sect. of the 5th Geo. 4. contains the following words: "And all persons making bricks or burning lime for sale, being tenants, lessees, or partners in such trade or undertaking, and all persons who seek their living by buying and selling, or by buying and letting for hire, or by the workmanship of goods and commodities."

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It will appear, that the words "persons making bricks" are omitted in the present statute, as it was discovered to be at direct variance with the principle upon which our bankrupt law is founded, which is, that it should be confined to traders; but the words, "goods and commodities," will be found in both statutes. Unless, therefore, it is admitted that it was the intention of the legislature not to include brickmakers, it must be contended that these words were omitted because they were mere surplusage, inasmuch as brickmaking was included under the words, "workmanship of commodities;" but why then were not all the previous dealings also excluded? as dyers, printers, bleachers, fullers, and calenderers, which had then for the first time been specifically brought within the operation of the bankrupt laws, as well as brickmakers.

But without reference to the repealed statute, this is a remedial law, and, like all remedial laws, must be so construed as to suppress the evil and to advance the remedy. The evil was, that many persons, who substantially were traders, were not included under the words which were intended to include all traders, such as dyers, bleachers, &c.; and to meet this evil the words, "workmanship of goods or commodities," were adopted; words which will include all persons who substantially trade, as workers in silver, or dyers, bleachers, &c.; and the expression will extend to house-painters, decorators, &c.; and of the necessity of including such persons there was an instance, some years ago, in this Court, where the decorator of the Pantheon theatre, although he had bought articles to a great amount, was held not to be a trader, as he expended the articles upon the freehold. The nature of this evil, and the remedy, was explained in a tract published some years ago by Mr. *Evans*,

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in a letter to Sir *Samuel Romilly*. (*a*) But Mr. *Evans*, although he wished that the bankrupt law should ex-

(*a*) He states: "But the following investigation, which has occurred to me in practice, will shew I conceive, as strongly as anything can do, the necessity of giving a more enlarged description to the occupations which fall within the scope of the bankrupt laws. The business of a dyer does not seem very properly to fall within any general description in the statutes; but being called upon to open a commission against a person of that business, I was shewn the 2d section of the 3d chapter in Mr. *Cooke*, in which dyers are enumerated amongst several other traders, and, satisfied with the authority, I acted accordingly. A short time afterwards, I was called upon to open a commission against a bleacher. The mere distinction, in fact, between a dyer and a bleacher is, that the drugs of the first are incorporated with the cloth which he dyes, and may, therefore, with considerable perversion of language, be said to be sold; but the drugs of a bleacher, though the business requires also an extensive credit, are used merely in disengaging the pieces from an adventitious colouring. As my authority here was silent, I thought it necessary to investigate the subject a little further, and to trace the origin of the law in the case of dyers.

"The doubts which were entertained as to declaring a bleacher a bankrupt, occasioned a case to be laid before one of the gentlemen who had written on bankrupt law; and from a description of the mode of conducting the trade, he expressed his opinion that a bleacher was not more subject to the bankrupt laws than a washerwoman; but some shreds and patches of incidental trading were afterwards discovered, upon which the commission was proceeded in.

"I think, Sir, you will agree, that the present state of commerce requires a more comprehensive description, to be given to the persons upon whom this system of law shall operate; and I think the subject may be materially assisted by turning our view towards Scotland, and extracting from the stat. 33 G. 3. the description of 'every merchant or trader, in gross or by retail, as a banker, broker, or underwriter, or a manufacturer, artificer, or mechanic, and in general any person who for himself, or as agent or factor for others, seeks his living by buying and selling, or by the workmanship of goods or commodities, or by any other

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tend to all descriptions of persons, did not conceive it consistent with the laws of England that they should be extended to landholders; and it will not escape notice, that in the Scotch act, to which Mr. *Evans* alludes, the word "manufacturer" is inserted, but is omitted in the present English act. (*a*)

Mr. *Rose* and Mr. *Swanston* for the petition.

It is a rule of construction, that a meaning must, if possible, be given to every clause and to every word in every clause, and it is not to be supposed that the legislature has used the words "goods and commodities,"

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of the foregoing occupations;' and that it may be desirable to make a further enumeration of persons, who, from their avocations, are often placed in a situation to which it is desirable that the bankrupt laws should be applied fairly and directly, rather than in that indirect and circuitous manner which I have alluded to."

(*a*) In the same work he says, "the next topic to which I think it material to advert, is the description of persons upon whom the laws respecting bankruptcy shall attach: and here, if I were to state merely my own individual opinion, I should be very brief indeed, as, notwithstanding all the commendations that have been bestowed upon the principle which confines them to persons engaged in commerce, I should think that the rules of equitable distribution and personal exoneration should be as extensive as the cases of insolvency themselves; but I am quite aware that, even if I had your concurrence in this opinion, the suggestion of any such regulation would be perfectly nugatory. The reception of your proposal for subjecting lands to simple contract debts in case of death, sufficiently evinces that a proposal going to a greater extent upon the same principle would be instantly rejected. I shall therefore take it for granted, that the operation of the law at present under discussion is to be confined to persons obtaining a credit for the purposes of trade."

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without some meaning. That brickmaking is within the customary obvious meaning of the words "workmanship of goods and commodities" is indisputable; and unless these words are so construed as to comprehend brickmaking, no meaning is assigned to them, and they are virtually expunged; for every other workmanship of goods and commodities is comprised either in the prior clause, which includes all buying and selling, or in the subsequent qualification, which excepts only labourers and workmen for hire.

The great difference between the old and the new law upon the subject of trading is, that in all cases before the present law came into operation a *buying* was indispensable. The Courts then considered a leaseholder as one buying the soil. But under the new law that difficulty is removed. The requisite components to a trading now are, in the words of the act, a buying and selling, *or* buying and letting to hire, *or* workmanship of goods and commodities. When, therefore, the requisites which constitute the buying and selling, or the buying and letting to hire, are not found, still if they come under the remaining division of workmanship of commodities it is sufficient; and that is precisely the case with brickmaking under the present circumstances, where, indeed, there is not a *buying*, but where every requisite is found to support a commission.

There are only three possible cases of workmanship of goods and commodities:

1st. The case of a workman not the owner of the goods; and this case is provided for by the exception, which must otherwise have been within the operation of the rule.

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2dly. The case of a workman who becomes the owner of the goods by buying, who buys as well as sells them, and this is comprehended within the prior clause relating to buying and selling.

3dly. The case of a workman who becomes the owner of the goods, not by buying, but by virtue of his ownership over some other subject of property of which they are a part of the produce; as the owner of an estate who works the earth into bricks. Unless this case is within the operation of the clause, it can have no operation at all. The counsel on the other side are bound to produce a case within this clause in this construction, and not within the preceding rule in the subsequent exception. Such is the construction without reference to the bankrupt law of Scotland: but by reference to the Scotch bankrupt laws, all difficulty with respect to the construction is removed, as the words are adopted in the English statute from the Scotch statute. The words in the Scotch act (*a*) are, "any person being a merchant or trader in gross or by retail, or a banker, broker, or underwriter, or a manufacturer or artificer, and in general any person who, either for himself or as agent or factor for others, seeks his living by buying and selling, or by the workmanship of goods or commodities, or by any of the foregoing occupations, or holds a share in any such undertaking." (*b*)

(*a*) 54 Geo. 3. c. 137. s. 15.

(*b*) Upon this subject Mr. Bell, in his Commentaries, page 554. vol. ii. says, "All manufacturers and artificers (with the exception laid down in the statute, of being a common labourer or workman for hire,) are liable to sequestration.—This, as already observed, determines many of those cases, which in England have strained the ingenuity of lawyers, to bring them within the description of merchants or traders and of buying and selling. A person who

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Mr. *Sugden* in reply.

There is a note in Mr. *Bell's* book, which, by altering the terms Scotland and England, will be an answer to

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manufactures for sale the rude materials furnished by his own property is not, in England, liable to a commission, because the words of the law, 'carry on the trade of merchandize,' cannot be satisfied without both a buying and selling; but the words of the Scottish statute are quite satisfied in such a case, for the landowner there is a manufacturer, and seeks his living on a part thereof, by the workmanship of goods or commodities. This distinction must be kept in view, in seeking analogies from English law: thus in England it is required, that there shall be an accretion of something else than the rude produce growing on the manufacturer's land, some material substance purchased in order to satisfy the law, which requires a buying as well as a selling; and so a manufacturer of charcoal is not a bankrupt, if he have the wood growing on his own land; but if he buy saltpetre and sulphur, and make it into gunpowder, he may be a bankrupt; or if he manufacture agricultural instruments, having the wood and the iron from his own land, he cannot be a bankrupt; but if having the wood he buy the iron, or having the iron, he buy the wood, then he may. All this subtlety, to the neglect of the rational principle which ought to direct this matter, seems mighty absurd, and it has no place in the law of Scotland.

"A person who buys a coal mine, and works it, and sells the commodity, is not in England within the reach of a commission, unless, along with his manufactured coals, he sells others which he has bought at market. In Scotland, a man who buys or leases a coal mine, or who works his own coal, is a manufacturer of a marketable commodity, and deals in a very perilous trade. The difficulties, therefore, which the judges have expressed, in admitting a coal-master to sequestration, seem to be groundless: it is a doubt in English law, not in Scottish. And the analogy of that law seems to have been unwarily adopted, wherever the Court have required the addition of new purchased materials to the original stock to make up the qualification; for that, though essential to the description of a trader, is not at all necessary to the description of a manufacturer: in several cases, accord-

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the reasoning, by analogy, from the bankrupt law of Scotland. In speaking of the doubts raised in the Scotch law whenever English analogy was adopted, he says, "I venture to make a strong protest against these doubts; because I would guard the law of Scotland from such English analogies as endanger the neglect of rational principle, which the English lawyers have been struggling to reach against the words of their statutes." (*a*)

We hope, therefore, that the Court will be on its guard in these Scotch analogies; the very principle of the bankrupt law of Scotland being opposite to that of the law of England, not only with respect to the trading, but with respect to various other parts of the law, of which there is a striking illustration with respect to preferences. In England all preferences are void; the Scotch law, on the other hand, seems not to recognise this doctrine. (*b*) But even if this Court were compelled to decide by the Scotch bankrupt act, there is a very important word which is contained in the Scotch act which is omitted in the

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ingly, a coal-master and lime-burner have been held liable to sequestration: a coal-master and worker of ironstone has also been held as under the act. In the case of *Stewart*, it was held alone sufficient that the debtor had a coal mine, and this has since been confirmed.

"Builders have long been considered as liable to sequestration, and yet, if it were an undecided point, it seems beyond question they are not merchants, neither can they be properly called manufacturers or artificers of goods or commodities; unless it may be held correct to consider one who converts a commodity into a part of the real estate, as a manufacturer of that commodity."

(*a*) *Bell*'s Commentaries, vol. 2. p. 355.

(*b*) See 1 *Rose*, 480.

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English act, *videlicet*, the word *manufacturer*; and it is under the head of manufacturer that Mr. *Bell* has classed brickmakers: and that the Scotch bankrupt laws were not intended to extend to landholders may be collected from the conclusion of the section, 54 G. 3. c. 137. § 15., which is, that no landholder or tenant of land shall as such be liable to have his estate sequestrated, even although he deal in cattle or grain, unless he shall *bonâ fide* be of the description of a trader in these articles, gaining or seeking to gain his livelihood, or a material part thereof, by dealing in cattle, not the produce of, nor grazed upon or made use of in the labour of his farm, or in grain not produced thereon.

July 14, 1827.

The LORD CHANCELLOR.

It is clear, that previous to the 6th Geo. 4. c. 16., the act now in operation for the consolidation of the bankrupt laws, this species of dealing by the owner of land in the produce of his soil, was not a trading.

The question now in agitation is, therefore, whether it is a trading within the new act, the words of which, most important to the present subject, are as follows: "all persons who seek their living by buying and selling, or by buying and letting for hire, or by the workmanship of goods or commodities:" and it has been contended, that this petitioner is a trader by the workmanship of goods and commodities. But after a careful consideration of all the arguments, I am of opinion, that he is not included within those words; and that the question is not so involved in doubt as to render it necessary to incur the expence, and occasion the delay, distressing to

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the parties, which will attend a reference to a court of law; for it must be observed, 1st, That before the present act passed, the questions upon this species of trading had been the subject of repeated discussions; it is, therefore, a reasonable presumption, that if the legislature had intended to include this description of persons in the bankrupt laws, that they would have been included by a clear and distinct enactment, instead of such vague words, as "the workmanship of goods and commodities;" and particularly when it is considered, that if this construction is to be put upon the words, the operation of the clause would be almost unlimited in its extent, as it would apply to every case, where the owner of the soil makes it available by working the rude commodity, as in the cases of alum, lime, or timber: it could not, therefore, have been the intention of the legislature to introduce such a great innovation, by such a scanty description. That it was not, in fact, the intention of the legislature, may, perhaps, without impropriety, be inferred, from the observations contained in the work of the gentleman who took upon himself the trouble of consolidating the different acts, and preparing the present bill for the consideration of parliament; who says, "the question, whether a person making bricks for sale is liable to the bankrupt law, was formerly much, and most unsatisfactorily, discussed. The point has since come under consideration; and the general doctrine, as extracted from the modern cases, may now be stated as follows: Where the business of brickmaking is carried on as a mode of enjoying the profits of a real estate, it will not make the party liable to the bankrupt law; but where it is carried on substantially and independently as a trade, it will do so; and there is no difference whether the party is a termor, or entitled to the freehold: the

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same general doctrine applies to the case of a person manufacturing alum, burning lime, or selling minerals from his own quarry" (*a*).

It was contended in argument, by Mr. *Swanston*, that without this construction the words "workmanship of commodities" could not have any meaning; and if this observation had been well-founded, the argument would have been unanswerable; but it appears to me not to be well-founded. It is clear that these words would have application to other persons; as all manufacturers who are supplied by the trader with the articles which they manufacture for sale, as lace manufacturers. The same observation is applicable to the manufacturers of stockings. It is, therefore, not necessary to apply this clause to the owners or occupiers of land.

Secondly, it is to be observed that the 5th Geo. 4th contained the words "and all persons making bricks or burning lime for sale, being tenants, lessees, or partners in such trade or undertaking;" which words are omitted in the present act. It must, therefore, be inferred that they were omitted by the legislature, as not intending to include this description of persons, unless the reasoning of Mr. *Rose* is satisfactory, that they were omitted because they were already included under the words "goods and commodities," which are to be found in both statutes; but I cannot think this a sufficient answer: — I cannot think that an enactment of so much importance, and at such direct variance with all the principles of the bankrupt laws, would be made by omitting a description which could not be doubted, and

(*a*) *Eden*'s Bankrupt Laws, page 4.

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leaving the question involved in the obscurity attendant upon these vague and general words. But even if the 5th Geo. 4th had now been in operation, it appears to me that the present petitioner could not have been at law considered a trader, for it is to be observed, that the words are " and all persons making bricks or burning lime for sale, being tenants, lessees, or partners in such trade or undertaking;" but can it be contended from these words, which are confined to tenants, lessees, or partners, should be extended to persons who are not within this description, but entitled in their own right, as the present petitioner, it must be remembered, is.

The legislature, therefore, has, I apprehend, explained the limit to which it for a short time supposed that this description of dealings should extend, and which would not include the present case. I do not think it necessary to do more than notice the obscrvations which have been made respecting the analogy to the bankrupt law of Scotland, as there are other words in the Scotch act, and the principle of the bankrupt laws of Scotland differs from the principle on which the bankrupt laws of England are founded. The commission, therefore, must be superseded, and with costs.

V. C.
LINC. INN.
Feb. 28,
1827.

Ex parte WEIGHT. — In the matter of WEIGHT.

If a bankrupt be committed without a protection, a detainer may be lodged against him by the assignee, between the time of applying to be re-examined and his examination.

THE petition stated, that a commission had issued against the petitioner in May 1826, and that the 4th of July in the same year was fixed for his final examination, which was however adjourned till the 11th of August. That on the 12th of August the petitioner was committed by the commissioners to Gloucester gaol for not answering to their satisfaction, and was confined in that part of the gaol which was not under the control of the sheriff, but under that of the magistrates. That on the 11th of September the petitioner caused notice to be given to the solicitor to the commission, that he was ready to submit to the commissioners, and on the 27th of September the petitioner was informed by the said solicitor, that the commissioners had appointed the 4th of October for that purpose. On the 3d of October a detainer on a writ issued on the 2d of October was lodged against the petitioner by the solicitor to the commission, at the suit of *Philip Foxhall*, who was one of the assignees. On the 4th of October the petitioner was brought before the commissioners and re-examined, and having answered to their satisfaction, they discharged him from their commitment, and sent a memorandum in writing thereof to the keeper of the gaol, and appointed the 13th of October for the petitioner to pass his final examination. That on the petitioner's being so discharged by the commissioners, their summons to him to attend on the 13th of October was shewn to the gaoler, who refused to release the petitioner on account of the detainer. The petition therefore prayed, that *Foxhall*, the detaining creditor, might be ordered to cause the petitioner to be discharged; and that he or the

solicitor to the commission might pay the costs of the petition.

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Ex parte WEIGHT. In the matter of WEIGHT.

The facts, as alleged in the petition, were not disputed.

Mr. *Shadwell* and Mr. *Rose*, for the bankrupt, contended that the protection from the commissioners had never ceased to operate; and if it did cease, it had revived immediately upon his conforming and giving notice of his wish to be re-examined, or at all events on the appointment by the commissioners of a day for his re-examination. The bankrupt, though committed to the county gaol, was committed there only as to a place of safe confinement, and was still in the custody of the commissioners. Had he been committed to the house of correction, it is clear that a detainer could not have had any operation, as he would not then have been, even constructively, in the custody of the sheriff; which proves that in the contemplation of the law the bankrupt, when committed, is still in the custody of the commissioners, wherever his actual confinement may be. In the present case, though within the county gaol, he was confined in that part which was allotted to convicts, and which was under the control of the magistrates only, and not of the sheriff, whose authority extended over that part only which was appropriated to debtors.

The detainer, however, is illegal within the 117th section of the bankrupt act. The bankrupt was not in custody at the time of his surrender; and though during a *sine die* adjournment he is not privileged from arrest, yet if the commissioners adjourn to a fixed day, he is clearly entitled to his discharge: and the rule applies equally, though the commissioners did not in the first

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instance adjourn the examination to a fixed day, if a day for that purpose were appointed by them before the detainer were lodged. There is nothing in the act of parliament to warrant the conclusion, that the day must be fixed at the time the adjournment is made. This is left open to them: they may fix it at any time: and they did fix it, and from that moment the bankrupt was allowed further time for finishing his examination within the letter as well as the spirit of the act of parliament. If, then, pending the last examination, the bankrupt be protected from arrests, *a fortiori*, he is protected from arrest by the assignee, who, with the solicitor to the commission, cannot be permitted to embarrass the examination, and obstruct that discovery and disclosure to which it leads.

Another reason for the bankrupt's discharge is the rule, that if a defendant be in custody on a criminal charge, leave of the Court or of a judge in vacation must be first obtained, before he can be charged with a civil action. 1 *Salk.* 354, 2 *Lord Raym.* 1572, 2 *Str.* 873, 1 *Blackst.* 30. And it has been decided, that this rule includes prisoners for contempts. A bankrupt's commitment, for not answering satisfactorily, partakes of both these offences, and is within the rule.

Mr. *Montagu* for the detaining creditor.

This Court can only be influenced by the strict law; and that arises from the two clauses, §§ 117 and 118. By the 117th, the bankrupt is protected during the forty-two days, "and such further time as shall be allowed him for finishing his examination." By the 118th, power is given to the commissioners, at the time appointed for the last examination, or any enlargement

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Ex parte WEIGHT. In the matter of WEIGHT.

or adjournment thereof, to adjourn such examination *sine die*, and he shall be free from arrest or imprisonment for such time, &c. as they shall appoint. If they are dissatisfied with the conduct of the bankrupt, they may adjourn his examination *sine die*, without any protection; if they are convinced of his good intentions, but he requires time, they may adjourn his examination, with a protection; but it cannot be contended, that a commitment to prison is such a proof of the approbation of the commissioners as to confer a privilege, to which he would not be entitled if it had been an adjournment *sine die* without a protection. The commitment to prison is, in fact, an adjournment *sine die*, with the most marked disapprobation of the commissioners; and the bankrupt must take the consequences of his own contumacy.

The VICE-CHANCELLOR.

The bankrupt being under commitment, I can never hold that the fact of the commissioners' acceding to his request to be examined, and appointing a day for that purpose, is an enlargement of the time within the meaning of the act. The appointment to be brought up for further examination was in consequence of his own application, and such application he might at any time have rescinded. It was still at his own option whether he would come or not.

The petition was dismissed.

From this decision the bankrupt appealed; and the case was fully argued by the same counsel, before Lord Chancellor *Eldon*, on the 17th of March 1827, when his Lordship delivered his opinion as follows.

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Ex parte WEIGHT. In the matter of WEIGHT.

Before I give judgment, I shall satisfy my own mind, by a careful examination of every part of the act of parliament which has relation to the present question; not only in the existing act, but the similar provisions in the former acts. My opinion is, that the two sections (117 and 118) taken together amount to this; that as long as the commissioners *adjourn*, in the strict sense of the word, the bankrupt is protected; when the adjournment is to a day certain, he is protected by the statute; and if *sine die*, then by virtue of the protection of the commissioners. But can it be said, that a commitment is to be considered in the light of a *sine die* adjournment with a protection, or that the bankrupt can, by procuring an opportunity of purging his contumacy by a satisfactory examination, confer a privilege upon himself. With this view of the case, I am of opinion, that the Vice-Chancellor was right, and that there can be no protection by virtue of an actual commitment.

The prisoner was not discharged, and the subject was not mentioned again.

V. C. LINC. INN. *March* 29, 1827.

Ex parte BIRCH. — In the matter of BIRCH.

The costs of a petition by a bankrupt for his certificate, presented after the petition day, will not be allowed.

ON the 24th of June 1826, a petition was presented against the bankrupt's certificate, which was answered for the next day of petitions, which was the 25th of July.

On the 26th of July 1826, the bankrupt presented his petition, stating that the above-mentioned petition

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Ex parte BIRCH. In the matter of BIRCH.

had not been duly served, and praying that his certificate might be allowed, with the costs of this application. No affidavit was filed against this petition.

The certificate had already been allowed; and the only question before the Court was the costs of the bankrupt's petition.

Mr. *Montagu*, for the bankrupt, stated, that this was the course which had been prescribed by the Court for the bankrupt, and he cited *ex parte Moore*, 1 *Gl.* and *J.* 253; and that the costs of a petition, rendered necessary by the conduct of the former petitioners, must be allowed of course.

Mr. *Heald* opposed the application for costs. The petition by the bankrupt had, in the first instance, been unnecessarily presented but a few days before the petition in opposition to his certificate, which petition was admitted from undue service to be a mere nullity (*a*), would have been disposed of as a matter of course, and his certificate allowed — as in fact had been the case.

The VICE-CHANCELLOR.

The rule in *ex parte Moore* is founded in reason; since it would be unjust to compel a bankrupt to wait, as in many cases he might a long time, for the hearing of a petition which must of necessity be dismissed when called on, from its not having been duly served. I consider the practice in this respect settled: but this is not a case within the necessity of the rule. The petition against the certificate is answered, for the petition day

(*a*) See *ex parte Furnival*, *ante*, vol. i. 254. and the cases there cited.

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Ex parte BIRCH. In the matter of BIRCH.

after Trinity term, which was on the 25th of July. After this day, and while the bankrupt petitions were in a course of hearing, the petition now before the Court was presented, and answered, of course, for the next day of petitions, which is the one before Michaelmas term; and could not, consequently, come on until the first petition had been disposed of. How then could it be necessary to present a petition for the removal of an obstacle, which must in the course of things be removed before the application for that purpose could be heard? Under these circumstances, therefore, I must refuse the bankrupt his costs.

V. C.
LINC. INN.
August 4, 1826.

Ex parte LEWIS. — In the matter of LEWIS.

A bankrupt cannot, after he has obtained his certificate, petition to supersede, because he was not a trader.

PETITION by the bankrupt to supersede his commission, upon the ground that he was not a trader. The bankrupt had obtained his certificate.

Mr. *Hart* and Mr. *Knight* for the petition.

Ex parte Bailey 2 M. & A. 86.
Ex parte Bath 4 Madd. 270

Mr. *Piggott*, against it, contended, that the bankrupt, by seeking and accepting his certificate, had precluded himself from contesting the legality of the commission, and he cited *ex parte Cutten*, in the matter of *Ruspini*, 1 *Gl.* & *J.* 317.

The VICE-CHANCELLOR.

The Court cannot, upon the application of the bankrupt, enter the question of the validity of the commission after he has taken measures to obtain his certificate,

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Ex parte LEWIS. In the matter of LEWIS.

unless there have been some mistake, by which he was misled to submit to a process which he now impeaches. It can only be upon the subsequent discovery of that of which he was ignorant when he obtained his certificate, that the bankrupt can come here to object to his own acts; but it is not to be supposed that he could be ignorant of the fact, whether he was or was not a trader. I entertain now the same opinion which influenced my decision in *ex parte Cutten*. There may be cases where a bankrupt's acquiescence alone will induce the Court to restrain him from contesting the commission; *a fortiori*, therefore, where there has been active interference; for such there must have been, since the certificate could not have been a surprise upon him, but must have been a matter of his own seeking.

*** The commission was afterwards superseded, on the ground of misdescription. See *ex parte Beadles*, in the matter of *Lewis*, *infra*.

L. C. WESTM. *May* 19, 1827.

LAWRENCE's Case.

A warrant stating that various questions had been proposed, "and amongst others, the following," is defective.

LAWRENCE, the bankrupt, was committed by the commisssioners for not answering to their satisfaction.

The warrant stated, that various questions were proposed to the bankrupt, "and amongst others the following, &c."

The bankrupt being brought before the Court, by writ of *habeas corpus*:

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LAWRENCE'S Case.

Mr. *Montagu* contended, that upon the authority of *Tomlin*'s case (*a*), to which this afforded a precise parallel, the bankrupt was entitled to his discharge.

Mr. *Heald* and Mr. *Rose* submitted, that since the passing of stat. 6 Geo. 4. c. 16. the rule in *Tomlin*'s case did not apply, since the Court was no longer confined to the contents of the warrant. The proceedings were in Court, and by the 39th section (*b*) the judge was empowered, in case the whole examination of the party committed should not have been stated in the warrant, to inspect and consider the whole of the examinations whereof any such question was a part; and the necessity of setting out more upon the warrant than such parts as were, in the judgment of the commissioners, material to the subject and unsatisfactory to them, was now avoided.

Mr. *Montagu* in reply.

The object of this provision was to protect the person committed, in order that a warrant, *prima facie* perfect, might not be made the instrument of injustice, by being correct in form, but not containing the whole substance. In such case the Court, " if required thereto by the

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(*a*) 1 *Gl. & Jam.* 375.

(*b*) " Provided also, that such Court or Judge shall, if required thereto by the party committed, in case the whole of the examination of the party so committed shall not have been stated in the warrant of commitment, inspect and consider the whole of the examination of such party, whereof any such question was a part: and if it shall appear, from the whole of the examination, that the answer or answers of the party committed is or are satisfactory, such Court or Judge shall and may order the party so committed to be discharged."

party committed," must ascertain whether the return is consistent with the real examinations upon the proceedings. It is a provision in favour of the liberty of the subject. In every other respect the law remains as it was before the passing of the present statute; and a warrant defective upon the face of it cannot be cured.

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LAWRENCE'S Case.

The LORD CHANCELLOR.

Independently of the 6 Geo. 4. c. 16. this warrant is bad, upon the authority of *Tomlin*'s case, where the warrant is almost *totidem verbis*. As to the 39th clause in the bankrupt statute, it is evidently for the benefit of the prisoner; it was never meant to supply defects in the commitment, but to enable the prisoner to detect them, and to shew to the Court that the warrant, though in form good, was essentially bad.

Bankrupt discharged.

PRICE's Case.

L. C.
WESTM.
HALL,
June 30,
1827.

A warrant is defective which refers to documents in a former examination, without setting them forth, so as to enable the judge to decide upon the same information as the commissioners possessed.

PRICE, the bankrupt, had been committed on the 21st of October 1826. The examination was as follows: —

Q. Do you exhibit the paper marked A. as your balance sheet?

A. Yes, it is, to the best of my knowledge.

Q. Have you examined it, so as to be able to swear to it as a correct account?

A. No, I have not.

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PRICE'S Case.

Q. Have you got any account to exhibit to the commissioners of monies received and paid by you in your trade during the last two years?

A. I have not, only the sheet marked A. now exhibited.

Q. Have you yourself examined the items in that account, with your books or vouchers, so as to say, on your oath, whether it be a true account or not?

A. No, I have not.

Q. Why have you not done so?

A. I have had nothing to do with my books for years.

Q. When you were before the commissioners on the 26th of September last, were you not required to be prepared to produce on this day, to which your examination was adjourned for that express purpose, a balance sheet, and an account of your receipts and payments for two years preceding the date of this commission?

A. Yes; I had a paper given me to that effect.

Q. Why have you not done it?

A. I thought if I brought the books and papers it was enough. As I have done nothing to the books for years, I was advised to go to Mr. *Dolphin* to assist me to make out a balance sheet.

Q. What books of yours have you examined, or extracts have you made from them?

A. None at all. I have done what I could in preparing the balance sheet, by enquiring of my sons about payments of money.

Q. You have taken credit in the account marked A., now produced by you, for 1,344*l.* as two years and eight weeks wages paid to eight men; where have you taken that account from?

A. That is what I guessed at.

Q. What were your men's names?

A. James Wallis, &c. &c.

Q. Were all these men in your employ for two years before the date of your commission?

A. I do not think they were.

Q. Can you tell which had been in your employ for two years?

A. There is *Wallis*, &c. &c. and two others I turned away some time before; it might be three months.

Q. What wages did you give them?

A. Some worked piece-work.

Q. What wages had *Harris*, *Jeffreys*, and the others?

A. *Harris* had 16*s.* per week; *Jeffreys* had 10*s.* per week; the others had piece-work.

Q. Where have you got the amount from you paid them?

A. I guessed it.

Q. Have you any account of the work your men did, and the wages you paid them?

A. No, I have not.

Q. By the account A. which you have now exhibited, you appear to have received, since the 5th of April 1824, the sum of 5,635*l.* 7*s.* 4*d.*, and to have paid, according to your own shewing, 2,360*l.* 18*s.* 10*d.*, leaving a deficiency of 3,274*l.* 8*s.* 6*d.* How do you account for that?

A. I have drawn bills, but I do not know the amount; some have been paid, but I do not know which.

Q. Is that the best account you can give?

A. It is.

To which answers, so put by us as aforesaid, the said *James Price* refused to give any other than the foregoing answers; which answers of the said *James Price* not being satisfactory, &c.

The bankrupt being this day brought up by *habeas corpus*:

1827.

PAICE'S Case.

Mr. *Wilson*, for the bankrupt, contended, that the warrant was defective in two respects: 1st, By the omission of the whole of the examination stated to have taken place on the 26th of September; and 2dly, By the omission of the balance sheet, or paper marked A.; to both of which allusions were frequently made, both in the questions of the commissioners and in the answers prepared by the bankrupt; and to render the examination intelligible, it was obviously necessary that the whole of the matter, upon which the commissioners formed their opinion, must be exhibited to the Court, as was clearly settled in *Coombe*'s case (*a*), where the Lord Chancellor says, "that all the examinations, connected with the cause of commitment, should be stated upon the warrant of commitment; and thus, at once, upon the face of the return, authentically and immediately, present the propriety of the detention to the consideration of the Court." Which is confirmed in *Crowley*'s case (*b*), where the Lord Chancellor, remarking upon the necessity of stating all the examinations, says, "It is not possible for commissioners to address their minds to what appears on the warrant, without being in some measure influenced by what does not appear."

Mr. *Rose*, *contra*, contended, that one complete examination having been set out upon the warrant, it must be presumed to contain the whole of what was connected with the subject of the commitment.

The LORD CHANCELLOR.

In two respects, this warrant is defective. In questions by the commissioners, and in the answers of the

(*a*) 2 *Rose*, 396. (*b*) 2 *Swanst.* 76.

bankrupt, reference is frequently made to documents which do not appear, so as to enable me to judge upon the same information which the commissioners possessed. The examinations, too, on the 26th of September, should have been presented to the Court.

1827.

PRICE'S Case.

Bankrupt discharged.

HOOTON's Case.

L. C. WESTM. HALL, *June* 30, 1827.

THE bankrupt, *Hooton*, was committed by the commissioners. The examination, as far as it related to the commitment, was as follows: —

A warrant is defective which refers to, without setting out, previous examinations, and without which the Court cannot judge of the sufficiency of what appears.

Q. Were you not examined before the commissioners on the 14th of September 1825?

A. I was.

Q. Were you not, at that time, directed by the commissioners to be prepared, against the day fixed in the London Gazette for your examination, with such a statement as that now enquired for?

A commitment is defective if the commissioners do not examine with sufficient minuteness.

A. There was some conversation on the subject; I cannot swear to the precise words.

Q. Was it to that effect?

A. I did understand it was something of that sort.

Q. Did you not undertake to make such a statement within fourteen days?

A. There may be something of that sort upon the proceedings.

Q. Did you not promise to make such a statement before the day fixed for your examination?

A. I promised to do what I could; but, at the same time, I mentioned how it was impossible for me to do so,

1827.

HOOTON'S Case.

or something of that nature; and there are several persons present who will, no doubt, recollect the observations I then made.

Q. Did you not promise Mr. *Banks*, when he left London, that you would forward your balance sheet to the solicitor under the commission, on the Wednesday following, or when else?

A. I did not say I would send it on the following Wednesday; but Mr. *Banks* said it might be ready at that time; and I have been informed, that Mr. *Montagu* thought it would be improper to render that statement, as petitions were pending.

Q. Have you any further discovery or disclosure to make of your property, than what you have already made?

A. I am ready to answer any question that may be put.

Q. Have you any other answer to give to that question?

A. If I am allowed to inspect my books, I will make out such a statement as I can swear to; but at present I am unable to finish my last examination, not having had that access to them that I think necessary.

Q. Have you any other answer to give to that question?

A. I think I might be able to finish my last examination in about a month, if I am allowed to have my books and papers.

Mr. *Montagu*, for the bankrupt, contended, that the warrant was defective in two respects. 1st, By reference in the examinationto a former examination which was not set out, and without which the examination before the Court was not intelligible; and 2dly, For want of minute examination within the rule in *Walker's*

1827.

HOOTON'S Case.

case (*a*). The whole of the examination was respecting the balance sheet insisted upon by the commissioners, and to the clear understanding of which a reference to former examinations was necessary. The commissioners then ask the bankrupt, "Have you any further discovery or disclosure to make of your property than what you have already made?" There is nothing in the examination before the Court relating to his property, or the discovery or disclosure of it; and if there were such examinations upon the proceedings, with which the commissioners were dissatisfied, they ought to have been stated upon the warrant, or how is the Court to judge. When a former question or answer is referred to, it must, with the answer, be repeated in terms, and then followed up with the further questions. If there existed no previous examinations upon the subject, then the answers to such general questions as appear upon the return are sufficient, upon the principle laid down by Lord *Eldon*, in *Walker*'s case, that a question followed by a direct answer, which question is unvaried in terms, and not followed up by any further examinations, can never be the ground of a valid commitment.

Mr. *Rose contra.*

The LORD CHANCELLOR.

There is a reference to previous examinations, which are not set out upon the warrant, and without which it is impossible for me to judge of the sufficiency of those that appear. The whole of the examinations upon the warrant are respecting the fact of the bankrupt's non-production of a balance sheet; and the commissioners

(*a*) 1 *Gl. & Jam.* 378. See also *Norris*'s Case, 2 *Jac. & W.* 457.

1827.

HOOTON'S Case.

refer to an undertaking by the bankrupt, which does not appear before me. The commissioners then ask, "Have you any further discovery or disclosure to make of your property than what you have already made?" Now, in the whole of the examinations upon the warrant, there is neither question nor answer relating to his property, or to the discovery or disclosure of it. The words "further discovery, &c." therefore, must refer to what took place at a former examination; and which examination, it must be presumed, was unsatisfactory to the commissioners. As there is nothing upon the warrant to enable me to judge whether it was or was not satisfactory, the bankrupt must be discharged. There is either an omission of previous examination, without which the present is unintelligible, or the present examination is defective on the part of the commissioners, from want of being pursued more minutely.

The bankrupt was discharged.

L. C.
LINC. INN.
July 12, 1827.

ATKINSON's Case.

The omission to set out a previous examination does not vitiate a commitment upon a distinct ground.

THE bankrupt was, on the 4th of April 1827, committed by the commissioners.

The warrant of commitment set out at length an examination upon the 3d day of February, and which commenced as follows: —

Q. "Does the account now produced by you, as being the Statement of your affairs, contain a list or statement of the whole of the debts owing by you; and

also a disclosure of all the property belonging to your estate, or to which you are entitled?

A. Yes, it does," &c., &c.

Throughout the whole of the examination, there were frequent references, both in the questions and answers, to the " Statement " above mentioned. Such statement, however, was not set out upon the warrant or the return.

After reciting the whole of that day's examination, the warrant proceeded, " and whereas the said *William Atkinson* being unable to make such disclosure and discovery as aforesaid, we the commissioners did adjourn such further examination to, &c.; at which time and place, &c. we did cause the following questions to be propounded to him, and to which he gave the answers respectively following each question."

Q. Have you made any enquiries from your wife or her uncle, or any other person, respecting the different sums of money in the savings bank at Skipton?

A. No; I have made no enquiries into it at all.

Q. Have you seen or been with your assignees relative to your affairs since the last meeting?

A. No.

Q. Where have you been since you were last before the commissioners, and what have you been doing?

A. I have been at Rilstone and different places in Yorkshire, and doing nothing. I was over at Haslingden once.

Q. Have you done anything whatever since your last examination for the better disclosure of your estate and effects?

A. No; — it was not in my power to do anything more.

1827.

ATKINSON'S Case.

Q. Why was it not?

A. I had done all I could do before. I made everything out I could do before, and I could do no more.

Q. Why did you not make enquiries respecting the several sums of money in the Skipton savings bank, relative to which you were examined last meeting?

A. I thought it was no use making enquiries, because I thought I understood there was nothing. I could not find it out: I could not go to demand other mens' property.

Q. Did you never know of the sum of 57*l.* 14*s.*, or any other sum being in the Skipton savings bank, in the maiden name of your wife?

A. I never made any enquiry respecting it, only they sent a letter to me, wanting a receipt for it from me: they wanted a discharge for that sum. I do not know rightly what sum it was. The money was *Caton's*: he put it into the savings bank in my wife's name. I do not know when he put it in.

Q. What made you consider the money as *Caton's*?

A. I never considered anything at all about it that the money was *Caton's*. I never knew anything about his affairs.

Q. Did you give the receipt and discharge which you say they wanted?

A. I only signed my name to it.

Q. Why did you sign your name?

A. I cannot give you an answer to that. I never considered anything at all about it. It was sent to me; I signed it, and sent it back again.

Q. Did you make no enquiry when the money had been lodged in the bank, and in whose name you signed such receipt?

A. No; I did not.

1827.

ATKINSON'S Case.

Q. Do you believe the money to belong to your wife?

A. No; I do not believe it belongs to my wife.

Q. To whom do you believe it does belong?

A. It belongs to *Caton*, I should think, for anything I know of it.

Q. How do you consider it belongs to *Caton*, when you have already stated that you never made any enquiry respecting it?

A. Well, I cannot tell what source it could come from, only from him.

Q. Is *Caton* a man of considerable property?

A. No, not of any property. I do not expect he has much property. He has saved something, by all accounts. He keeps a small shop to sell groceries.

Q. Did *Caton* ever tell you, that he had given to each of your daughters the sum of 50*l.*, or any other sum?

A. No; he never told me anything about it. I never made any enquiry about it.

Q. How came you to consider money standing in the bank books, in the names of your wife and daughters, to be another man's property?

A. Well, I considered no ways it was another man's property. I was obliged to consider it was not mine. If he was so good as to make them that present, it was not my business to consider anything at all about it.

Q. What became of the money for which you signed the receipt before spoken of?

A. I do not know.

Q. How came you to sign a receipt for money which you never received, and about which you never made any enquiry?

A. I knew it was not mine.

1827.

ATKINSON'S Case.

Q. Was not the money drawn out, to prevent its being taken under an execution against you?

A. I do not know what reasons he had for taking it out.

Q. Whom do you mean by *he?*

A. Caton: he might be rather a bit timorous about it.

Q. When did you sign the receipt for the money?

A. I cannot tell when it was, rightly.

Q. Do you know anything of the sum of 50*l.*, placed in the hands of Mr. *Parkinson;* and for which you or your wife, the assignees are informed, held Mr. *Parkinson's* promissory note?

A. I do not know of any.

Q. Have you any other answer or explanation, to give to the several questions before put to you?

A. No; I have not.

Q. Have you any other discovery or disclosure of your estate and effects, to make to the commissioners?

A. No, I have not.

Which said several answers, so made by him as aforesaid, not being satisfactory, &c.

The bankrupt being brought up by *habeas corpus:*

Mr. *Rose* contended, that the warrant was incomplete. The balance sheet, or Statement produced by the bankrupt, and which formed the principal subject of the examination, had not been set out. As often as that document was referred to, either in question or answer, it became a part of such question or answer; and there was no rule more perfectly settled, than that every part of the examinations, upon which the commissioners formed their opinion, must be submitted to the Court, which had to decide whether or not that opinion was

1827.

ATKINSON'S Case.

rightly formed; and he cited *Crowley's* (*a*) case, *Tomlin's* (*b*) case, and the recent decisions in *Lawrence's* (*c*) case, and *Price's* case (*d*). The foundation of the examination was the written statement delivered by the bankrupt. It was apparent upon the examination, that such statement was unsatisfactory to the commissioners; but how could the Court judge, unless it were set out.

Mr. *Twiss*, *contra*, said, that had the warrant ended with the examination on the 3d of February, there might have been a doubt as to its legality. As the fact was, however, the argument respecting the inability of this Court to judge of the propriety of the commitment, did not apply; neither did the cases cited. The warrant contained two distinct examinations, upon two distinct and independent subjects of enquiry; and admitting that the warrant was bad in form, as to the first day's examination upon the subject of the balance sheet, the whole of it might be rejected as surplusage; for there remained the other examination, upon the subject of the money lodged in the savings bank, the completeness of which was not impeached; and the unsatisfactoriness of which, as regarded the disclosure which it was the bankrupt's duty to make, was so apparent as to put it beyond a doubt that it was upon such last day's examination that the bankrupt was committed. It was quite clear, from that total absence of connection between the two examinations, that if only the latter examination had been set forth, the warrant would have been sufficient both in form and substance. The former part of this warrant, therefore, being unnecessary, must not, from its defect in form, be allowed to vitiate the whole.

(*a*) 2 *Rose*, 396.
(*b*) 1 *Gl. & Jam.* 373.
(*c*) *Ante*, page 209.
(*d*) *Ante*, page 211.

1827. The LORD CHANCELLOR.

ATKINSON'S Case.

In *Tomlin's* case and in *Lawrence's* case, the warrant professed to set out a part only of the examinations, upon that very subject upon which the bankrupt was committed; and in *Price's* case there were direct references to the written document in the examinations, with which the commissioners declared themselves dissatisfied. Here the examinations, upon a transaction which is unsatisfactorily explained, are complete, and unconnected with any thing *dehors* the examinations: there is not, throughout the enquiries as to the money in the savings bank, any allusion to the document referred to in the previous examination, but which document is there omitted. Had any answer been unintelligible without a reference to the written statement, I would have held this warrant to have been defective; but there is upon the face of that examination, which is confined to the subject of the savings bank, a transaction which it is evident was within his knowledge, such a manifest intention to defeat the objects of his examination, that as it contains no allusion to the paper referred to in the other part, I feel bound to declare that I think the warrant is sufficient, and the omission immaterial.

Bankrupt remanded.

V. C.
LINC. INN.
April 5,
1827.

Ex parte PARREY. — In the matter of FORD.

A commission wholly omitting to describe the bankrupt of the place where he had chiefly been known as a trader is bad, though his last place of trading were correctly described.

THIS was a petition to supersede the commission for misdescription. The bankrupt was described as "*Richard Ford*, late of Sutton, Surrey, and now a prisoner for debt in the King's Bench prison."

The commission issued on the 11th of November 1826. It appeared from the evidence, that the bankrupt had for some years resided and carried on business at Bath; which city he had quitted a few months previously to the issuing the commission. It was sworn in opposition to the petition, that *Ford* had resided eight months at Sutton, and a few weeks only at Chelsea.

Mr. *Heald* and Mr. *Flather* for the petition.

Mr. *Knight* against it.

The VICE-CHANCELLOR said, he considered the omission of all reference to Bath, where chiefly *Ford* was known as a trader, and where the body of creditors might naturally be presumed to reside, was as much calculated to mislead, as if he were described of a place where he had in reality never been.

Commission superseded, at the costs of the petitioning creditors.

L. C.
LINC. INN.
March 12, 1825.

Ex parte NEALE. — In the matter of NORRIS.

A Master's jurisdiction to tax the bill of costs of the solicitor to a commission under the 5 G. 2. c. 30. s. 46. not conclusive until the Master shall have signed his certificate.

THE commission issued in 1813, and *Atkinson* and *Blair* were chosen assignees. The bill of costs of the solicitor to the commission was referred to Master *Morris*, under the jurisdiction created by 5 Geo. 2. c. 30. s. 46. The Master died before he had made his certificate of taxation; he had, however, reduced the bill more than a sixth. In July 1816 *Blair*, the assignee, died, and the petitioners were chosen in his stead. Other bills were delivered in by the solicitor. The new assignees petitioned, that all such bills should be referred to be taxed, as well the bill which had been referred to Master *Morris*, as the bills delivered subsequently.

August 20, 1817.

The order for taxation was made (*a*), and the result was, that more than a sixth was taken off the bill submitted to Master *Morris*, but less than a sixth from the other bills. There was, however, more than a sixth taxed from the bills collectively, including the one which had been before Master *Morris*.

The question now was, by whom the costs of the taxation should be paid?

Mr. *Heald* and Mr. *Duckworth* for the assignees.

Mr. *Hart* and Mr. *Parker* for the solicitor.

The LORD CHANCELLOR.

The costs of settling and adjusting the bill, under the 5th Geo. 2., are paid by the estate; that statute creating,

(*a*) See *Buck*, 111.

upon this subject, a new and independent jurisdiction, but not excluding the Chancellor from his jurisdiction in bankruptcy. The jurisdictions are concurrent; but the application at the public office, and the reference of a bill to the Master, under 5 Geo. 2. does not exclude my jurisdiction: that is only excluded by the Master having signed the certificate, under the 5 Geo. 2.; and till then I can direct a taxation, which will include a review of what has been done, but not finished, under 5 Geo. 2. As the Master derives his authority from the statute, and not by delegation from the Lord Chancellor, when he has finished his examination of the bill, and signed his certificate, then the whole is concluded by a competent jurisdiction, and I have no right to interfere. Here, however, the Master never completely exercised the authority given him by the statute; and my order to tax entitled him to review what had been done by his predecessor; for the taxation was under my order, not under the statute; the costs, therefore, must follow the result of the bills collectively, and the solicitor must pay them.

1827.

Ex parte NEALE. In the matter of NORRIS.

Ex parte CAVALIERE. — In the matter of POWELL.

V. C. LINC. INN. *Feb.* 28, 1825.

PETITION, by a creditor residing in France, to prove in respect of goods sold in France to the bankrupt.

A seller abroad, of contraband goods, is entitled to prove, unless he be a participator in smuggling them.

Mr. *Montagu* for the petition.

Mr. *Roots* objected to the proof being admitted. The goods sold by the petitioner were contraband in England,

1825.

Ex parte CAVALIERE. In the matter of POWELL.

and proof of a debt arising from smuggling transactions was not admissible; and the fact of the goods being bought by an Englishman, for the purpose of being brought to England, where they were contraband, was sufficient to fix the creditor with notice. *Ex parte Moggeridge, Co. B. L.* 203; *ex parte Daniells*, 14 *Ves.* 191.

The VICE-CHANCELLOR.

That objection does not apply, unless the vendor be a party to the actual smuggling. An Englishman having a right to purchase in France, must be held liable on the contract; and the knowledge, by the seller, that the goods were contraband here, will not preclude his proof, unless he were a participator in the act of running them.

Proof admitted.

V. C. LINC. INN. *August* 4, 1826.

Ex parte HUDSON. — In the matter of CLARKE and RAMSDEN.

The title to a petition in bankruptcy is not vitiated by its being also entitled "In Chancery."

PETITION to supersede, and stay the certificate.

The petition was entitled, "In chancery," beneath which were the words "In the matter of *Clarke* and *Ramsden*, against whom a commission hath issued."

Mr. *Knight* objected, that it was not within the jurisdiction; and he cited *ex parte Glanfield*, 1 *G.* & *J.* 387.

1826.

Ex parte HUDSON. In the matter of CLARKE and RAMSDEN.

Mr. *Montagu* insisted, that the fact of its being entitled, "In the matter of *Clarke* and *Ramsden*, &c.," was quite sufficient; or, if insufficient, it might be amended on the spot, as was the petition in *ex parte Glanfield*.

Mr. *Knight* said, that the amendment might be made, treating it as a petition to supersede only; but as to that object of the petition, which was to stay the certificate, the petition must be taken to be dismissed. Defects in form, admitting of amendment in other cases, are fatal, when the objection is taken by the bankrupt on an application to stay his certificate. (*a*)

The VICE-CHANCELLOR thought, as the petition was properly entitled, in one respect, "In the matter of, &c.," there was nothing in the words "In chancery" calculated to mislead the respondents; and overruled the objection.

(*a*) See *Ex parte Harford, Buck*, 38; *ex parte Kendal*, 1 *V. & B.* 548; *ex parte Harrison*, 1 *Gl. & Jam.* 71; *ex parte Cundall*, 1 *Gl. & Jam.* 37; *ex parte Hirst*, 1 *Gl.* & *Jam.* 76; *ex parte Curtis*, 1 *Rose*, 274; *ex parte Emmett*, 1 *Mad.* 14.

V. C. LINC. INN. *August* 1, 1827.

Ex parte WILLIAM INKERSOLE, one of the bankrupts, as sole surviving trustee, &c., and JAMES GODDARD and ELIZABETH his wife. — In the matter of RIX, GORHAM, and INKERSOLE.

A new trustee may be appointed, under 6 G. 4. c. 16. s. 79. without a reference.

BY indenture made between *Elizabeth Dowley* of the first part, *James Goddard* of the second part, and *Thomas Inkersole* (since deceased) and the petitioner, *William Inkersole*, of the third part, being a settlement in contemplation of the marriage afterwards solemnized between *James Goddard* and *Elizabeth Dowley*, the sum of 800*l.*, part of the personal estate of *Elizabeth Dowley*, was, with *James Goddard*'s consent, assigned to *Thomas Inkersole*, deceased, and the petitioner, *William Inkersole*, upon trust to place the same at interest upon such security as they should think proper, and upon certain trusts therein mentioned for the benefit of the petitioners, *James* and *Elizabeth Goddard*, &c.

The sum of 800*l.*, in the indenture mentioned, was, soon after the execution of the settlement, put into the hands of the petitioner, *William Inkersole*, and there remained until his bankruptcy, it never having been laid out upon any security; but the same was not carried to the account, or applied to the use, of the partnership.

The petition prayed, that *William Inkersole* might be at liberty to prove, for the benefit of *James* and *Elizabeth Goddard*, the sum of 831*l.* 10*s.*, due from the petitioner, *William Inkersole*, against his separate estate, and receive dividends thereon in common with the other separate creditors; and that some proper person or persons might be appointed as trustees under the said settlement, in the place of the said *Thomas Inkersole*, deceased,

and *William Inkersole*; and that what should be received upon the said proof might be paid to the person or persons so appointed, upon the trusts of the settlement.

1827.

Ex parte INKERSOLE and others. In the matter of RIX and others.

Mr. *Wray* said, that in making this application he must admit that no such order as the one sought by the petition had hitherto been made. The practice was to apply, under the 79th section of 6 Geo. 4., for a reference to the master, to approve of a proper trustee in the room of the bankrupt. (*a*) The case before the Court differed from that class of cases contemplated in the statute, inasmuch as the trust money was actually in the hands of the trustee at the time of his bankruptcy; and as the *cestuique* trust could only recover the wreck of the trust estate by means of (perhaps very small) dividends, it was desirable to avoid the expence of a reference to the Master, if the Court could dispense with what certainly was the strict rule, and itself act, in the first instance, upon the evidence which would be produced to the master.

The VICE-CHANCELLOR said, it certainly would be hard to direct a reference, the expence of which might equal the possible amount of dividends to be received, if he could feel satisfied that he were not bound by the practice; he should, therefore, consider the question, and read the affidavit which would be submitted to the Master if the reference were made.

The VICE-CHANCELLOR.

August 2.

I am of opinion, that I ought to grant the prayer of this petition. Having before me an affidavit (*b*), which,

(*a*) *Ex parte Saunders*, 2 *Gl. & Jam.* 152.

(*b*) "*James Goddard* saith, that he hath long known and is

1827.

Ex parte INKERSOLE and others. In the matter of RIX and others.

upon a reference to the Master, would satisfy him, and induce him to approve the person proposed as a trustee, I may properly dispense with that circuity, which would be expensive to the parties, and lead only to the same result.

It was ordered, that the petitioner, *William Inkersole*, should be at liberty to go in under the said commission, and prove against his own separate estate, but for the benefit of the other petitioners, *James Goddard* and *Elizabeth* his wife, and their children, and other persons interested under the said settlement, the said sum of 831*l.* 10*s.* so due and owing from the said *William Inkersole*, as in the said petition mentioned: and that the commissioners should receive such proof accordingly: and that the dividends should be paid on such proof rateably and in proportion with the rest of the separate creditors of the said *William Inkersole*, not disturbing former dividends: and that the said *P. M.* and *S. S.*, in the said affidavit described *as*, &c., be appointed trustees under the said settlement, in the place or stead of the said *Thomas Inkersole*, deceased, and the said *William Inkersole:* and that the dividends to be declared in respect of such proof be from time to time paid, by the assignees of the said bankrupt's estate, to the

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well acquainted with *P. M.* of —— and *S. S.* of ——, the parties proposed to be new trustees under the said settlement, in the place and stead of *Thomas Inkersole*, deceased, and the said *William Inkersole;* and that they are parties of considerable respectability, and some property; and in the judgment and belief of deponent, very fit and proper persons, from their responsibility and knowledge of the parties interested, to be selected for the office of trustees; and that they are willing to accept the trust, if the Court shall think proper to appoint them to be such trustees.

said *P. M.* and *S. S.*, as such trustees, to be by them applied upon the trusts of the said settlement, or such of them as are existing and capable of taking effect.

1827.

Ex parte INKERSOLE and others. In the matter of RIX and others.

Ex parte CARTER and others, executors of JOHN GODWIN; *Ex parte* GIBSON and others. — In the matter of MINCHIN, CARTER, and KELLY.

L. C. LINC. INN. *March* 31, 1827.

A partner cannot claim against the separate estate before payment of the joint debts.

IN the year 1808, *Godwin*, *Minchin*, *Carter*, *Lindegren*, and *Goldson*, commenced a partnership as bankers at Portsmouth. In and previous to 1816, *Godwin* sold out stock to a large amount, and advanced the proceeds to the firm. To secure these loans two joint bonds were executed by the other partners, the one from *Minchin*, *Carter*, and *Goldson*, and the other by *Minchin*, *Carter*, *Lindegren*, and *Goldson*. A memorandum, also dated 11th November 1815, was signed by *Minchin*, *Carter*, and *Goldson*, which was as follows: "We hereby undertake to replace to our copartner, *John Godwin* Esq., all such stock as he shall or may have sold out for the use of the copartnership firm of *Godwin* and Company, or which shall have been transferred into the name of *Daniel Mildred* Esq., for the use of the said firm of *Godwin* and Co. Witness our hands," &c.

In February 1816, *Lindegren* retired from the partnership. In February 1817, *Goldson* died. In June 1817, *Godwin* died, having by his will appointed the petitioners (among others) his executors.

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At the time of his death there was due from the firm to *Godwin* a large sum upon account current, together with the whole of the stock. After the death of *Godwin*, *Minchin* and *Carter* carried on business together, and possessed themselves of the partnership property. *Kelly* was soon afterwards admitted a partner, and the firm of *Minchin, Carter*, and *Kelly* took upon themselves the debts of *Minchin* and *Carter*, and continued the business until November 1818.

In June 1818, the executors filed a bill against *Minchin, Carter*, and *Kelly*, for an account and a receiver. In September 1819, a commission issued against *Minchin, Carter*, and *Kelly*. Since the bankruptcy, *Kelly* died.

The petitioners applied to prove upon the bonds against the separate estate of *Minchin*, the sum of 29,070*l.*, the value of the several sums of stock sold by *Godwin*, together with the dividends due thereon at the date of the commission, and to have their claim for the full amount of 37,081*l.* 3*s.* 4*d.*, admitted by the partnership to be due to the estate of *Godwin*; but the commissioners refused to allow either a proof or a claim.

Against which decision the executors of *Godwin* presented this petition.

It appeared from the evidence, that debts, for which *Godwin* was at the time of his death liable, had been proved under the commission to a large amount: and numerous notes, which bore *Godwin*'s signature or name, and which had been issued during his life-time, and not afterwards re-issued, had also been proved. It appeared

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also, that the executors were well aware, that after the death of *Godwin* his name was still continued in the firm, which was publicly and on all occasions designated and written "*Godwin* and Company."

The petition of the executors was heard before the Vice-Chancellor, on the 12th day of May 1824, when it was contended by Mr. *Wray*, for the petitioners, that they were entitled to claim, if not to prove; first, because it was an equitable debt, and therefore proveable. Secondly, because the debt due to a partner was a debt which would be barred by the certificate of his copartner. Thirdly, supposing it to be unjust that a partner, who is himself liable, should be permitted to take any of the funds before the creditors are paid, this was a question, not of proof, but of dividend.

Mr. *Horne*, Mr. *Montagu*, and Mr. *Knight*, against the petition, contended, that the entering a claim would virtually be making the separate estate pay the joint debts, in contravention of the established rule in bankruptcy.

His Honour was pleased to order, that the petitioners should be at liberty to go in under the said commission, and prove against the separate estate of *Thomas Andrews Minchin* such debt as they should be able to establish, in respect of the loans or advances of stock made by the said *John Godwin*, as in the petition mentioned; and in respect of the balance due at the death of the said *John Godwin*, from his surviving partners, *Minchin* and *Carter*, to his estate, beyond such loans or advances of stock; and that the petitioners should be admitted creditors under the said commission for what they should so prove; and that the dividends

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from time to time to be declared upon such proof, (the amount thereof to be respectively verified by affidavit,) should be paid into the bank, in the name of the accountant general, in trust in this matter, subject to further order, and should be laid out in the purchase of three *per cent.* consolidated bank annuities, in trust and subject to the further order of the Court; and that the same, when so paid in, was not to be paid out without notice to the petitioners: and that it should be referred to one of the Masters of the Court of Chancery, to enquire and state to the Court whether any and what debts proved under such commission were due from the firm at the time when *Godwin* was a partner therein: and the usual directions.

Against this order a petition of appeal was presented by certain of the separate creditors of *Minchin.*

Mr. *Horne* and Mr. *Montagu*, for the petition of appeal.

The law is settled, that one partner cannot prove against his partners' estate until all the joint creditors are paid. The question here is, whether that can be done, which, in effect, as regards the joint creditors, is the same as proving, *viz.*, Can a claim be entered, while there are debts of the firm of which *Godwin* was a partner still unsatisfied? Till they are paid, *Godwin's* estate, whether in the hands of himself or his executors, is still liable; and as *Godwin*, if living and solvent, could not prove, neither can those who represent him. The order of the Vice-Chancellor, which directs, that though the dividends shall not be received *pari passu* with the other creditors, yet that they shall be retained, amounts to nothing more than enabling the partner to do that

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indirectly which he could not do directly, and in effect subverts the established rule of the Court, that the joint estate shall be applied to the joint creditors, and the separate estate to the separate creditors; and that no obstacle shall be interposed which may prevent the possible surplus of the separate estate being carried, if necessary, to the joint estate. The only case in which a partner can come in *pari passu* with the creditors upon the separate estate, is where the joint creditors have been paid in full, whether out of the joint estate, or by the solvent partner himself, who by such payment is entitled to prove under Sir *Samuel Romilly*'s act, as a surety paying after the bankruptcy; but in the present case there are joint debts to a large amount still unpaid.

The law has recently been settled in *ex parte Moore*. (*a*) It was thought in that case extremely hard that the right of the solvent partner should be postponed, when the very fact of admitting his proof against the separate estate would have enabled him, *instanter*, to pay all that remained due to the joint creditors; but the Court was bound by the law, which has enacted, that payment must precede the proof against the separate estate, the funds of which cannot be stopped, prospectively, upon the faith of the partner being able afterwards to pay all the joint debts. This would be the effect of retaining the dividends upon a claim; and the practice to which it must lead will be this: — that where one of two partners becomes bankrupt, the other, upon the chance of being ultimately obliged to pay more than his share of the joint debts, will enter a claim against the estate of his partner; and thus will the fixed rule as to the primary application of the joint and separate estates be destroyed.

(*a*) *Ante*, page 166.

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Mr. *Wray*, for the executors, renewed the argument which he had submitted to the Vice-Chancellor; and added, that the character of this case was altered, and taken out of the general rule in bankruptcy, by the fact of a suit in equity having been instituted before the bankruptcy.

The LORD CHANCELLOR.

The history of this case, which extends through a long period of time, is shortly this. A partnership commences in the year 1808, which, up to the year 1817, when *Godwin* died, undergoes various changes, but in all of which *Godwin* is concerned until the time of his death. It appears that two joint bonds were given by the other partners to secure to *Godwin* certain stock sold out by him. There is also a memorandum, by which three of the obligors engage to repurchase and replace in *Godwin*'s name all the stock which had been or should be sold out for the purposes of the partnership. It may be remarked that the obligors upon these joint bonds are not in both cases the same, the first being signed by four, and the other by three of the partners; but that under present circumstances is immaterial to the decision of this case, since the question must be, not against what estate the proof or claim must be made, but whether any proof or claim whatever is admissible. It may be also noticed, that in the partnership books these transactions are all entered: the books, therefore, may be considered as evidence of the contract by the other partners to replace the stock.

Upon the death of *Godwin* the partnership was reduced to two of the original partners and Mr. *Kelly*, who was taken into the firm after *Godwin*'s death; and

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so the firm was constituted when the bankruptcy took place. It is clearly proved that the name of *Godwin* was continued to be used by the firm, with the assent of his executors; and it is a question, therefore, whether his estate be not bound by all the transactions, even of the last partnership.

The bankruptcy having occurred, the question arises, whether the executors of *Godwin* have a right to prove that which, as between the remaining partners and *Godwin's* estate, is clearly a debt; and the answer is, that the estate which they represent is itself debtor to the joint creditors, who have proved under the commission, and that the executors, therefore, cannot prove in competition with them — with those who are, in fact, their own creditors. But it is argued, in reply, that the executors have a right to claim against the separate estate, there being, as it appears, no joint estate. Supposing the fact to be, that the estate of *Godwin* is surety for the other two, and paid the debts for which they were liable; as the law now stands, the debt, though paid after the bankruptcy, may be proved; but I never yet heard of a case, where a surety, not being in a situation to prove, has, nevertheless, been allowed to claim. I had occasion most anxiously to consider this question in the late case, *ex parte Moore*, in the matter of *Sheath* (*a*); and though I never in my life made a decision with more reluctance than in that case, I cannot think that my conclusion was erroneous. The law was there too strong for me; and I can find nothing in the present case to take it out of the principle which then governed my decision. It is clear, therefore, that a surety cannot prove, unless, according to the express words of the act of parliament, he have

(*a*) *Ante*, page 166.

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paid the whole debt, or part in discharge of the whole. It is equally clear, that *Godwin's* estate, being liable, has neither paid the whole, nor part in discharge of the whole; and an *undertaking* to pay, I was too well satisfied, in *ex parte Moore*, was not sufficient. Nor do I see, in principle, how the entering a claim differs from the establishing a proof, since it operates just as effectually in interrupting the payment of the creditors; and if it interrupts the payment of the creditors, it is equally an interference with their rights, whether the dividends be received by the surety in the first instance, or paid into the bank in trust for him. To this conclusion I have been compelled to come; nor can I conceive how the commencement of a suit in equity before the bankruptcy, can make any difference as regards the rights of the creditors. The debt, therefore, not being at present proveable, a claim cannot be admitted. If, after all the joint creditors are paid, a surplus shall be found to remain, it will then, and not till then, be a question how that surplus shall be applied, with regard to the debt due to Mr. *Godwin's* estate.

The Vice-Chancellor's order was reversed.

Ex parte DOWMAN.—In the matter of DOWMAN and OFFLEY.

L. C.
LINC. INN,
August 17,
1827.

Where it was agreed, upon a loan to the bankrupt, bearing interest, that six months' notice should be given before repayment was required, the debt is proveable though no notice were given before the bankruptcy.

THIS was an appeal from a decision of the Vice-Chancellor, in which His Honour decided, that where it was agreed, upon a loan to the bankrupt, that six months notice should be given before repayment was required, and no notice was given before the bankruptcy, the debt was not proveable. The case, as decided by the Vice-Chancellor, is reported *ante*, page 85.

Mr. *Rose*, for the petition of appeal, relied on *Clayton* v. *Gosling*, 5 *Barn.* & *Cres.* 360., and *ex parte Elgar*, in the matter of *Mantle*, *ante* p. 1., with which cases the decision of the Vice-Chancellor was quite irreconcileable.

Mr. *Montagu* against the appeal.

The debt is payable only in the event of notice, which notice was not given before the bankruptcy, and the debt therefore is not proveable. It has been contended that a constructive notice must be inferred from the fact of interest having been paid; but the case is the same as that of a conditional bond, and must be tried by the same test, *viz.*, was there a breach before the bankruptcy, so as to put the bond in suit. *Winter* v. *Mouseley*, 2 *Barn.* & *Ald.* 802. In the case of *Clayton* v. *Gosling* an action might have been maintained *instanter*, for a bill was given bearing interest, which let in the inference of constructive notice; but here an action could not have been maintained, and, as a necessary consequence, there can exist no right of proof.

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The LORD CHANCELLOR.

The right of proof does not in all cases depend upon the fact, that an action can be maintained. Proof is admissible upon a bill of exchange not due, yet no action is then maintainable.

Mr. *Montagu.*

That is by special legislative enactment; and can apply to those cases only where there can be a rebate of interest. In all other cases the tests of proof are, 1st, Can an action be maintained? 2dly, Is it a debt payable on some fixed day after the bankruptcy, or is it a contingent debt within the meaning of 6 Geo. 4. c. 16. § 56?

The LORD CHANCELLOR.

By the payment of interest this is clearly *debitum in presenti solvendum in futuro*, the time of the *solvendum* depending upon the fact of notice. This is the opinion of Lord *Eldon*, in *ex parte Elgar*, and by that case I feel myself bound; and the case before the Court seems to be the same in principle.

At the time the Vice-Chancellor gave judgment in the present case, as reported, neither *Clayton* v. *Gosling*, nor *ex parte Elgar*, had been decided, or I have no doubt those decisions, especially the latter, would have influenced His Honour's opinion; since it was the result, not only of Lord *Eldon*'s own judgment, but of a conference between his lordship and the judges in the Courts of law. I am of opinion, too, that this is a case susceptible of a rebate of interest. A considerable arrear was due at the time of the bankruptcy, and the non-

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payment amounted to a forfeiture of the debt before the bankruptcy. By the payment of interest, then, we must look upon this as an immediate debt; and where a day is fixed for payment after the bankruptcy, the proof is admissible upon rebating the interest. Now, if no interest were reserved, the calculation of rebate would be impossible; but interest being reserved in the present case, the debt may be proved subject to such rebate; and in this mode: the debt being payable six months after notice, and bankruptcy occurring, all we have to do is to drop the six months interest anterior to the bankruptcy, and the same result is produced as the rebate upon a bill of exchange.

The order of the Vice-Chancellor was reversed.

Ex parte BEADLES. — In the matter of LEWIS.

V. C. WESTM. *November* 9, 1827.

The omission to describe the bankrupt as of the place where he actually traded, is fatal.

PETITION to supersede the commission for misdescription of the bankrupt, who was described as "late of the parish of Llangebby, in the county of Monmouth, dealer and chapman."

It appeared that *Lewis* never had been a trader while residing at Llangebby: that since quitting Llangebby, he had been, during the years 1816, 1817, and 1818, a prisoner in Bristol gaol, and from that time to the date of the commission, in 1825, (and since,) a prisoner in

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the Fleet, where the trading commenced, whereupon the commission was grounded. (*a*)

Mr. *Knight*, for the petition, referred to the decision *ex parte Parry*. (*b*) The present case was even stronger; for no place was mentioned in the description where the bankrupt had ever carried on business.

Mr. *Piggott*, for the petitioning creditor, submitted, that *ex parte Parry*, and the other cases of the same class, had been cases of *mis*-description; and not, as in the present case, merely not a *full* description; and even supposing it could, in general, be necessary to add to the description his last actual place of abode, it had in no instance been deemed necessary to mention a prison as a place of residence.

The VICE-CHANCELLOR.

The only trading pretended to have been exercised is that carried on after the bankrupt became a prisoner within the Fleet. Whether this be a trading within the meaning of the bankrupt laws, it is not necessary now to decide, since the description contained in the commission is clearly insufficient. He is described as late of Llangebby, dealer and chapman; and it is admitted that, while residing at Llangebby, he never was a dealer and chapman; and I hold that those words always refer to the place where the bankrupt has traded, so as to come within that description.

Commission superseded.

(*a*) The question as to the sufficiency of such a trading was strongly argued, but the case was decided upon other grounds.

(*b*) *Ante*, page 225.

BEVAN *v.* LEWIS. (*a*)

V. C.
LINC. INN.
May 17,
1827.

Upon a bill filed before the bankruptcy of the plaintiff, supplemental bill may be filed by the assignees without the consent of creditors.

Quære as to Ocklestone v. Benson. — There is not any necessity for putting in the proceedings as evidence where there is no notice to dispute the commission.

A BILL was filed by a member of a firm of two, to impeach an execution obtained by a separate creditor of his partner. The plaintiff in equity afterwards became bankrupt; and his assignees filed a supplemental bill, to have the benefit of the former proceedings. Both causes now came on to be heard.

Mr. *Horne* and Mr. *Theobald* for the plaintiff.

Mr. *Heald* and Mr. *Rose* for the defendant, the execution creditor, insisted, that the supplemental bill could not be filed without the consent of the creditors of the bankrupt, according to the 88th section of 6 Geo. 4. c. 16; and they cited *Ocklestone* v. *Benson*, 2 *Sim. & Stu.* 266.

The VICE-CHANCELLOR asked, whether there was no distinction between assignees commencing an original suit, and continuing by supplemental bill a suit commenced originally by the bankrupt; and observed, that had the case of *Ocklestone* v. *Benson* come on upon a plea, he much doubted whether he should have come to the conclusion which the Court had there arrived at; but as the objection now insisted on had not been raised by the answer in the present instance, this not being the case of a plea, he could not regard the objection; for he was not at liberty, upon reading the record, to assume

(*a*) *Ex relatione*, Mr. *Beames*.

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that the assignees had not had the consent of the creditors. The objection, therefore, was overruled. (*a*)

Another objection was then raised, namely, that the plaintiffs had not put in the proceedings, within 6 Geo. 4. c. 16. s. 92; to which it was answered, that as no notice had been given to prove the trading and act of bankruptcy, no proof of such requisites was necessary within the 91st section. To this the Vice-Chancellor assented, and overruled the objection.

V. C. WESTM. HALL. *Nov.* 9, 1827.

Ex parte FREEN and MORRICE. — In the matter of JOHN CROSS STARKEY and WILLIAM STARKEY.

A security for a separate demand does not extend to a joint demand.

THE petition stated that the bankrupt *John Cross Starkey*, in October 1824, having required the petitioner, *Thomas Freen*, to negociate bills and notes for himself and his partner *William Starkey*, deposited in his (*Freen*'s) hands certain title deeds and writings, together with the following letter: "Mr. *Thomas Freen*. Sir,— You having requested of me to afford you security in the dealings which you have with me, I have this day deposited in your hands the title deeds of lands and property in Cheshire; together with the lease of two houses, situate in Moore-street, Saint Anne's, which I agree that you shall hold as a security for any sums of money which you may, at any time, and from time to

(*a*) See 4 *Mad.* 372.; 3 *Ter. Rep.* 23; 1 *Atk.* 90. 210.

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time, pay or be liable to pay, or guarantee to pay for me, with interest, commission, and other lawful charges, not exceeding the sum of 5,000*l.*; and I engage, on request, to execute, at my charge, a good and valid mortgage to you of the lands and property in the deeds mentioned, in trust for sale after three months notice. I am, &c. *John Cross Starkey.* London, 11th October 1824." That the petitioner *Freen* negotiated several bills for the *bankrupts;* and, among the rest, three bills of exchange, which the petitioner *Morrice* had discounted for the petitioner *Freen*, relying upon the security of the deeds above mentioned. That the petitioner *Freen*, by three similar memorandums, signed by himself, became liable to pay to the petitioner *Morrice* the three bills, in case the same respectively should not be paid when due; which memorandums were in the following form:

"Mr. *J. Morrice.* Sir,—I hereby guarantee the payment to you of the undermentioned bill, with interest and expences, in case the same should not be paid when due. Bill dated 24th September 1825, at four months, due 27th January 1826, by *A. Fairburn* on *Wilson* and Co., for 756*l.* 5*s.*—*Thomas Freen.*"

The petition then stated, that in April 1826 *John Cross Starkey* and *William Starkey* had been declared bankrupts; that *Morrice* had proved these bills, and had called upon the petitioner *Freen* to pay the same, or to sell the above-mentioned securities, and pay the produce in liquidation of the bills; that the petitioner *Freen* had applied to the assignees to permit the securities to be sold under the commission, *Morrice* offering to withdraw his proof, or allow the same to stand for the balance, after the application of the produce of such

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securities; with which proposal the assignees had declined to comply. The petition, therefore, prayed, that the mortgaged premises might be sold, and that the money arising from the sale might be paid to the petitioner *Morrice*, in satisfaction of so much of the bills then in his possession as the same would extend to satisfy; and that the proof made by *Morrice* might either be expunged, or stand for the remainder of the sum secured by the said bills.

Mr. *Rose*, for the petition, submitted, that *Freen* had a clear equity to give to others the benefit of the security given to him.

Mr. *Heald* and Mr. *Knight* against the petition.

This is a separate security only, while the transactions are upon the face of them partnership transactions. The guarantee is for the debts or liabilities of *John Cross Starkey* alone, and cannot be extended to debts or liabilities of any other person in conjunction with *John Cross Starkey*. It must be construed literally in this Court, as it would be construed at law. There is no evidence to shew, that the operation of the guarantee was ever extended by parol; and if such evidence were produced, the extension would be void by the statute of frauds. If the guarantee could be construed in a wider sense than its letter warranted, might it not be applied to all debts of all persons with whom *John Cross Starkey* might in any possible transactions be implicated? The instrument itself must supply the only means for its own construction; nor can parol evidence be admitted, that it was the intention of the parties that it was meant to cover the partnership debts, even had such intention existed.

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Mr. *Rose* in reply.

It is not pretended, that the proceeds of these bills were applied to increase the estate; and each partner is separately liable for the joint debts. In the present sense, therefore, the debt of the two *Starkeys* must be taken to be a debt from *John Cross Starkey*. In equity this would clearly be a security for a joint debt; for a debt is not less a separate debt for its being joint and separate; and you never could have got back the security without paying the debt, nor is there any rule in bankruptcy at variance with this principle.

The VICE-CHANCELLOR.

I do not think myself authorized to grant the prayer of this petition. On examining the construction of this instrument, does it appear that it was for securing money to be advanced to the two *Starkeys*, or to *John Cross Starkey* alone? The expressions throughout apply to *John Cross Starkey* only. If the petitioners' argument prevails, there is no limit to the partnership or joint liabilities to which it might be extended. It might be extended to money advanced to *William Starkey*, on account of the partnership, without the concurrence or knowledge of *John Cross Starkey*. I am of opinion, therefore, that this memorandum is not applicable to joint debts; and I do not find, upon the evidence before me, that *Freen* has become liable for any separate debt of *John Cross Starkey*; for the fact of that partner causing the bills to be negotiated for the partnership purposes, is not sufficient to bring them within the separate guarantee.

Petition dismissed with costs.

V. C. LINC. INN. *August* 11, 1827.

Ex parte FREE and others, assignees of EDMEADS and others. — In the matter of BURGESS.

The interest of partners as tenants in common, where the estate was purchased out of the joint property, and mortgaged by the firm for a joint debt, is a joint security.

BY indentures of lease and release, bearing date the 11th and 12th of October 1822, the release made between *Edwin Burgess* of the first part, *George Burgess* of the second part, and *Edmeads*, *Atkins*, and *Tyrrell*, of the third part, reciting that by an indenture, bearing date the first day of July 1822, the messuages and hereditaments therein mentioned were limited and assured to such uses as therein mentioned, (that is to say,) as to three several undivided fourth parts, and also as to two several undivided third parts of the other fourth part, upon trusts, as to one undivided moiety or half part thereof, to such uses as the said *Edwin Burgess* should appoint; and in default of appointment, and subject thereto, to the use of the said *Edwin Burgess* for life; remainder, in case of forfeiture, &c. to *J. Carr*, as a trustee during the life of the said *Edwin Burgess*, upon trust to permit the said *Edwin Burgess* to receive and enjoy, &c. for life; remainder to the use of the said *Edwin Burgess*, his heirs and assigns for ever: and as to the other undivided moiety thereof, to such uses as the said *George Burgess* should appoint, with like limitations in default of appointment: and reciting a mortgage by demise of 1,000 years from the said *Edwin Burgess* and *George Burgess*, to *Erskine* and *Jacobson*, for securing 2,500*l.* and interest; and that *Edwin Burgess* and *George Burgess* had opened a running and fluctuating banking account with *Edmeads*, *Atkins*, and *Tyrrell*, who had discounted and still continued to discount bills of exchange for *Edwin* and *George Burgess*: and that for securing all monies then due or which might become due at any time thereafter from the said *Edwin* and *George Burgess*, or either of them, or

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from them or either of them jointly with others, or any one or more of them solely, it had been agreed that the said *Edwin* and *George Burgess* should convey the shares and hereditaments therein mentioned, in manner and subject to the covenants thereinafter contained: it was witnessed, that they the said *Edwin Burgess* and *George Burgess* did, and each of them did, direct, limit, and appoint that the three undivided fourth parts of the two undivided third parts of the remaining fourth part of and in the said messuages and hereditaments situate in Maidstone, being the hereditaments comprised in the before-mentioned indenture of the 1st of July 1822, and all other the share and interest of them the said *Edwin Burgess* and *George Burgess*, of and in the said hereditaments and premises, should go, remain, and be to the use of the said *Edmeads*, *Atkins*, and *Tyrrell*, their heirs, &c., for ever, subject to redemption.

In September 1824, a commission issued, under which *George* and *Edwin Burgess* were declared bankrupts. In December 1825, *Edmeads*, *Atkins*, and *Tyrrell* were declared bankrupts, and the petitioners were appointed assignees; and, as such, applied to enter a claim for the sum of 20,000*l.* against the joint estate of *George* and *Edwin Burgess;* but the commissioners refused to enter such claim, or a claim for any sum, until the said mortgage securities were sold.

The petitioners therefore prayed that they might be at liberty to prove the sum due to them as such assignees against the said *George* and *Edwin Burgess*, without a previous sale of the securities.

Mr. *Montagu* for the petition.

The question, since the decision of *ex parte Peacock*, 2 *Gl.* & *Jam.* 27., is simply, was this a joint or a sepa-

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rate security? The instrument speaks for itself. Each party was interested, not as joint tenant, but as tenant in common; and it was, therefore, the separate property of each, and the creditor is entitled to prove against the joint estate, without a previous sale of the separate security.

Mr. *Rose*, for the assignees, said, that the premises had been bought out of the funds of the joint estate, had been used as the joint estate, and were mortgaged by both as security for a joint debt; and that this being the substance of the transaction, the right was not to be defeated by the form of the conveyance.

The VICE-CHANCELLOR said he had not any doubt; and that the security must be sold as a joint security, and the proof limited to the difference.

Petition dismissed without costs.

V. C. LINC. INN. *August* 3, 1826.

Ex parte WEBSTER and *ex parte* STONEHOUSE. In the matter of GREGORY.

A docket struck without an act of bankruptcy, upon the belief, by the creditor, that an act of bankruptcy had been committed, will support a commission upon a subsequent act.

THE petition of *John Webster* stated, that on the 18th of February the petitioner had struck a docket against *Gregory*, and bespoke the commission. On the 25th of February he obtained the commission, under which *Gregory* was, on the 1st of March, declared bankrupt. On the 3d of March notice of such adjudication was left at the Gazette office, and was inserted in the Gazette on

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the 4th of March. On the same 4th of March notice was given to the petitioner, that a commission had issued, on the 18th day of the previous month of February, against *Gregory*, upon the petition of *Stonehouse*, but that such commission had not been opened. That until such notice, the petitioner had not any knowledge or suspicion of another commission having issued. That the affidavit, on which the docket was struck by *Stonehouse*, was sworn on the 11th of February, at which time *Gregory* had not committed an act of bankruptcy.

There was a cross petition presented by *Stonehouse*, which stated the foregoing facts; and that the bankruptcy, under the commission issued by *Stonehouse*, was found on the 14th of March; that both the commissions were in operation; and praying a *supersedeas* of the commission issued by *Webster*.

Mr. *Montagu*, in support of the petition *ex parte Webster*, submitted, that his commission ought to stand, for two reasons; first, because the docket, struck in support of the commission issued by *Stonehouse*, was irregular; and, secondly, because, even had it been regular, there had been laches on the part of *Stonehouse*.

As to the irregularity: — the docket was struck on the 11th, when *Stonehouse* swore to his belief that *Gregory* had committed an act of bankruptcy; when, in fact, no act of bankruptcy had been committed; when there was no foundation for such belief; and when, in his affidavit in answer to this petition, he did not venture to say why he so believed. That affidavits of this nature had frequently been censured by the Court: they were prospective affidavits, by which a creditor tampered with his oath, to secure the profits of the commission to his own

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attorney; and that though, under the old bankrupt statutes, where the act of bankruptcy had relation back to the day on which the docket was struck, there might possibly be some justification of this heedless mode of swearing, there was not any pretext for it under the present bankrupt act, in which such relation did not exist; and he referred to *Gordon* v. *Wilkinson* (*a*), in which Lord *Kenyon* says, "I cannot conceive how a commission of bankrupt can be taken out in such a case, before the two months are expired; because, in order to obtain it, there must be an affidavit made that the party has committed an act of bankruptcy. But surely in these instances, though the party imprisoned be in the progressive course of committing an act of bankruptcy from the time of his first lying in prison, yet the act itself is not completed till the expiration of the two months, by the very words of the act of parliament. (*b*) The commission, therefore, cannot regularly issue until that time; and the Lord Chancellor, if the fact were disclosed to him, would most probably supersede the commission, which can only be founded on perjury. If such a practice has prevailed, it is fit that a stop should be put to it as soon as possible." And he referred also to *ex parte Leicester* (*c*), in which the Lord Chancellor remarked, that "he had often been surprised at this mode of swearing to an act of bankruptcy first, and enquiring afterwards whether there *was* an act of bankruptcy." And to *Wydown*'s case (*d*), where the same judge observed, "the great facility with which these affidavits are made is surprising; but whether a commission that has issued is to be superseded on account of a rash affidavit that an act of bankruptcy had been committed, is a very different consider-

(*a*) 8 *Term Rep.* 507.
(*b*) 21 Jac. 1. c. 19. s. 2.
(*c*) 6 *Ves.* 430.
(*d*) 14 *Ves.* 82.

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ation." He cited also *ex parte Dufrene* (*a*), in which the Lord Chancellor says, "there is no doubt if the affidavit stated the act of bankruptcy, by lying in prison two months, and you suppose it possible that the person swearing knew that the other had not been so long confined, that would supersede the commission, as that would be perjury; but the question is, whether, as that act of bankruptcy by lying two months in prison was not committed, I must conclude, that the creditor had no other ground for his belief that an act of bankruptcy was committed. I admit the consequence that has been stated, that if this affidavit may be made before the end of the two months, it may upon the first day; but I say the witness so swearing is guilty of perjury, if he does not believe that other acts of bankruptcy were committed; and there is no security, except the conscience of the man who will make the affidavit and give the bond."

Mr. *Duckworth* contended, that *Stonehouse* had first struck the docket, and that he had proceeded to a declaration of bankruptcy within the time allowed by the general order; and that it was sufficient that *Stonehouse* had, when he ordered the commission, reason to believe that there was an act of bankruptcy committed.

The petitions stood over, that *Stonehouse* might file an affidavit, to shew the grounds of his belief for his affidavit when he struck the docket.

August 3.

The petition came on again on the 3d of August 1826, when it did not appear that on the 11th of February, the day on which *Stonehouse* had struck the docket, any act of bankruptcy had been committed; but the affidavit of *Stonehouse* stated, "that previous to the 11th day of

(*a*) 1 *Ves. & Beames*, 55.

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February 1826, when the deponent gave instructions to his solicitor to strike a docket and issue a commission against the bankrupt, the deponent had been informed, by *Richard Coates* of Manchester, who was a creditor of the bankrupt, that he had called several times for his account at the dwelling-house of the said bankrupt, in the month of December 1825, at the most likely time of the day to meet with the said bankrupt, viz. during the dinner hour; but that the said *Coates* had never been able to meet with the bankrupt. That the said *Coates* also told the deponent, that at the time he so called at the house of the bankrupt he had no doubt but that the bankrupt was within his house. That on or about the 7th of February, the deponent, being then in Liverpool, called upon the bankrupt, who was then in the borough gaol there, when the bankrupt informed the deponent, that he had then given instructions to an attorney in Liverpool to file a petition in the insolvent debtors' court, in order to take the benefit of the insolvent debtors' act, and that the deponent believed such information to be true."

The affidavit of *Gregory* the younger stated, "that he recollected *Richard Coates*, a creditor of the deponent's father, calling several times, in the month of December 1825, at the house of his father, for money; at which several times the deponent's father was in the house, though he was denied to *Coates*. That his father had kept his house for fear of seeing the said *Coates*, as well as his other creditors, in consequence of not being able to meet their demands."

An affidavit was also filed, on behalf of *Stonehouse*, by *J. Whitehead*, the solicitor, who stated, that he had, on the 7th of February, received instructions from *Gregory*, then a prisoner at Liverpool, to prepare a petition in the

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insolvent court. That he had accordingly prepared it, and transmitted it to his agent in London, for the purpose of being filed; but that, on the 20th of February, the petition had been returned to him not filed, the Court requiring an affidavit of the reason why *Gregory* had not petitioned within fourteen days of his commitment, as required by the act; that he had returned it to his London agent on the 23d; and that, in the meantime, neither he nor *Stonehouse* knew that it had not been filed.

The VICE-CHANCELLOR.

Owing to a mistake at the bankrupt office, it appears that two commissions have been granted against the same person. This, of course, is illegal, and *prima facie* the first applicant must have the priority. It is insisted, however, by the party who obtained the second commission, that his must be preferred, inasmuch as at the time his docket was struck there was a complete act of bankruptcy, whereas in the other case it was merely speculative. I allowed the case to stand over upon a former day, to give Mr. *Duckworth*'s client an opportunity of offering an explanation, as to what specific act of bankruptcy he meant to rely upon when he made the affidavit that *Gregory* "had become bankrupt;" at least, that he might shew what reasonable grounds he had for believing that an act of bankruptcy had then been committed. I am not satisfied with the explanation offered. The solicitor who struck the first docket has not ventured to swear that he was informed of any specific act of bankruptcy. It is not sufficient, that he was informed generally by the petitioning creditor, that *Gregory* had committed several acts of bankruptcy, and that he fully believed the fact. I am decidedly of opinion, that a

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solicitor is not justified in striking a docket upon any such vague statement; but that he ought to have reasonable ground for himself believing that an act of bankruptcy had been actually committed before he takes that step. It is clear that such precaution was not in this case taken. I am as little satisfied with the statement, that he was informed and believed that the bankrupt had filed his petition in the insolvent court, unless he had also sworn that he believed such petition was actually filed, in which event only the proceeding becomes an act of bankruptcy. Upon the whole, I am of opinion, that it was a speculative commission, and that the second in point of date must be preferred. The costs of the petition by *Webster* must be paid by the petitioner *Stonehouse*: I cannot take them out of the bankrupt's estate.

From this decision a petition of appeal was presented, which was heard on the 15th December 1827.

Mr. *Heald* and Mr. *Duckworth* for the petition of appeal.

Mr. *Horne* and Mr. *Montagu* in support of the Vice-Chancellor's decision.

The LORD CHANCELLOR.

If I had thought with His Honour the Vice-Chancellor, that this was a mere speculative commission, I should have arrived at the same conclusion, and confirmed His Honour's judgment. I cannot, however, concur in the opinion which has been formed. I am satisfied that it was not a speculative commission; for upon a careful examination of the affidavits, it appears

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that the petitioning creditor was informed that the bankrupt had given directions to file a petition in the insolvent debtors' court; and also that he was informed by *Coates*, a creditor, that he had kept out of the way: and there is an affidavit by the son; all which satisfy me that he had reason, exclusive of the probable act of bankruptcy at the expiration of the twenty-one days, to believe that an act of bankruptcy had been committed. I think, therefore, without differing with the Vice-Chancellor as to the law, but only as to the facts, that the order must be reversed.

Ex parte BERESFORD. — In the matter of LINGARD.

V. C. WESTM. HALL, *Nov.* 17. 1827.

A petition to tax a bill after payment must state objectionable items.

THIS was a petition for a reference to the Master, for the taxation of a solicitor's bill of costs.

The petition stated, that being a creditor under the commission, the petitioner had, in April 1824, employed *Charles Wood* to present a petition, and transact other business connected with this matter. That in September 1825 *Wood* delivered his bill of costs, amounting to 164*l.*, on account of which he had already received sums amounting to 66*l.*, leaving a balance of 98*l.*; and that such bill, as the petitioner had been advised, contained many extravagant and unreasonable charges. That in October 1825 *Wood* had caused the petitioner to be arrested and held to bail; and it being inconvenient to the petitioner to put in special bail, he had paid the said alleged balance, together with the costs

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of the action; at the same time protesting, that such payment was made solely on that ground, and he should apply to have the bill taxed.

Mr. *Spence* for the petition.

Mr. *Montagu*, against the petition, objected, that as the bill had been paid, and as no objectionable items were set out upon the petition, the Court had not jurisdiction. There was not, indeed, any reported case to this effect, but it had long been settled practice; admitted too by Lord *Eldon*, who, by deciding that where the bill of the solicitor to a commission amounted to more than 100*l.* such a statement of objectionable items was *not* necessary, but that a reference was of course, had given the strongest confirmation to the doctrine that in other cases the rule was imperative. *Ex parte Brereton*, 4 *Maddock*, 479; *ex parte Emery*, *Buck*, 422.

Mr. *Spence* in reply.

It is admitted that there is no case in the books establishing the rule here contended for; nor is there anything in the words of Lord *Eldon* to authorize us in supposing that the line where the necessity for setting out items ceased, was to be drawn at the sum of 100*l.* Even admitting such a conclusion, it is not at the balance of 98*l.* that this bill is to be considered, to which it was reduced by payments on account, but to the whole sum of 164*l.* In no light, however, can the cases cited be applied to the present, but must be confined to the bills of solicitors up to the choice of assignees; and the reason is obvious — to prevent the issuing of commissions being improperly made matters of profitable traffick by attor-

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nies: and that this was not an absolute payment, but merely a payment under protest.

The VICE-CHANCELLOR.

It has always been the practice, when a solicitor's bill has been paid, to set out some objectionable items, in order to give the Court jurisdiction to refer it for taxation. I do not see anything in the present case to take it out of the rule.

Petition dismissed with costs.

V. C. LINC. INN. *April* 3, 1827.

Ex parte DIMMOCK and others. — In the matter of JOSEPH LOCKER, and in the matter of THOMAS SMITH and JOSEPH LOCKER.

The Chancellor has jurisdiction to enforce payment from the petitioning creditor of a forfeiture for compounding with the bankrupt. But quære. See the next case.

ON the 4th March 1826 a commission was issued against *Locker*, upon the petition of *Gorton* and *Johnson*, partners, to whom he owed a debt of 194*l*. *Locker* directed his solicitor, *Griffin*, to treat with *Johnson*, one of the petitioning creditors, for the purpose of making an arrangement for satisfying the debt, and preventing the commission being prosecuted. *Johnson* objected to entering into any arrangement with the bankrupt *Locker*, but stated, that he was willing to sell and assign over the debt to any person who was willing to become the purchaser, for a sum at the rate of 19*s*. in the pound, together with the full costs of striking the docket. A person of the name of *Keeling* was then employed to purchase the debt, and supplied with money belonging to the bankrupt. On the 9th of March an assignment

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was executed, and the sum of 212*l.* 10*s.* was paid for debt and costs, and the commission was abandoned.

In May 1826 a joint commission issued against *Smith* and *Locker*, under which the petitioners were chosen assignees; and they prayed, that the separate commission might be superseded, at the expence of *Gorton* and *Johnson*, and that they might be declared to have forfeited their debt, and that they might be ordered to repay the said sum of 212*l.* 10*s.* to the petitioners, for the benefit of the creditors.

Mr. *Heald* and Mr. *Carr* for the petition.

Mr. *Pepys* and Mr. *Rose*, against it, contended, that the Court had no jurisdiction; and they cited *ex parte Marshall*, *ante*, page 53. The Court has no power to inforce the payment of money forfeited under the penal clause, 6 Geo. 4. c. 16. s. 8. (*a*) Yet the power is in effect

(*a*) That if any such trader, liable by this act to become bankrupt, shall, after a docket struck against him, pay to the person or persons who struck the same, or any of them, money, or give or deliver to any such person any satisfaction or security for his debt, or any part thereof, whereby such person may receive more in the pound, in respect of his debts, than the other creditors, such payment, gift, delivery, satisfaction, or security shall be an act of bankruptcy. And if any commission shall have issued upon the docket so struck as aforesaid, the Lord Chancellor may either declare the commission to be valid, and direct the same to be proceeded in, or may order it to be superseded, and a new commission to issue, and such commission may be supported either by proof of such last-mentioned or of any other act of bankruptcy; and every person so receiving such money, gift, delivery, satisfaction, or security as aforesaid, shall forfeit his whole debt, and also repay and deliver up such money, gift, satisfaction, or security as aforesaid, or the full value thereof, to such person or persons as the commissioners, acting under such original commission, or any new commission, shall appoint, for the benefit of the creditors of such bankrupt.

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assumed if it supersedes the commission upon the ground alleged in the petition, because it thereby prejudges the fact upon which the penalty is incurred. They can only come to this Court to supersede the separate commission, because a joint commission has issued; the other question is for a court of law. Unless an order in that form can be made upon this petition, it must be dismissed.

Mr. *Montagu, amicus curiæ,* said, that an appeal had been presented against the decision in *ex parte Marshall,* which had been cited in support of the objection to the jurisdiction; and that the Lord Chancellor had, after hearing the arguments (March 6), expressed his opinion to be strongly in favour of the jurisdiction, but his Lordship had not yet given judgment.

The VICE-CHANCELLOR.

I have no doubt, upon the evidence before me, that the petitioning creditor knew that though *Keeling* was ostensibly the purchaser of the debt, yet that he was in reality through him dealing with the bankrupt. Neither have I any doubt as to my jurisdiction, to order the commission to be superseded. The difficulties which, in the first case, opposed themselves to this Court's exercising a jurisdiction to compel the repayment of the money received, were considerably weakened by further reflection and examination of the act of parliament, and have now wholly disappeared.

The act authorizes the Lord Chancellor, in such a case as the present, to supersede the commission; and it then provides, that every person so receiving such money, &c., shall forfeit his whole debt, and also repay

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and deliver up such money, &c., to such person or persons as the commissioners shall appoint, for the benefit of the creditors of such bankrupt. After such special provisions as to the *supersedeas* and the consequent forfeiture, I cannot but conclude that the power of enforcing the forfeiture is incident to such jurisdiction; and that I ought to accompany the order for *supersedeas* with a declaration that the debt is forfeited. As this is the first order upon the clause in the statute, it is necessary to pay due regard to its form. It is not strictly necessary to supersede, because the commission is already supersedeable, as of course, by effluxion of time, without coming to this Court. Nevertheless, having come here for other purposes, the order for *supersedeas* may properly be included. (*a*)

The order stated, that it being declared that *J. Gorton* and *D. T. Johnson* had forfeited their debt of 194*l.*, so due to them from the said bankrupt *Joseph Locker*, as in the said petition was alleged, it was ordered, that the said *Gorton* and *Johnson* should repay to such person or persons as the major part of the commissioners named in the joint commission against *Smith* and *Locker* should appoint, for the benefit of the creditors of the said *Joseph Locker* who should come in and prove their debts under the said commission, the said sum of 212*l.* 10*s.* And that the commission issued against *Joseph Locker*, bearing date the 4th March 1826, should be superseded, and that the costs of such *supersedeas* should be paid to the petitioners by the said *J. Gorton* and *D. T. Johnson*.

(*a*) See *ex parte Lowe*, in the matter of *Amyes*, 1 *Gl. & J.* 78.

Ex parte MARSHALL. — In the matter of BELL.

L. C.
LINC. INN.
April 28, 1827.

THIS was an appeal from the decision of His Honour the Vice-Chancellor, which is reported, *ante*, page 53.

Mr. *Horne* and Mr. *Rose* for the appeal.

Mr. *Agar* and Mr. *Montagu* against it.

The Lord Chancellor ordered, that in case the said *Edmund Hamer* should seek to prove any debt under the commission, he should not be allowed to make such proof without restoring to the assignees what he had received, amounting together to the sum of 473*l.* 10*s.*, with interest thereon; and that the appellants, the assignees, should be at liberty to bring and prosecute any action at law, as they should be advised, to compel such repayment or restoration, whether the said *Hamer* should or should not make any proof under the commission; and that the order of the Vice-Chancellor, which directed that the appellants should pay the costs of the original petition, should be reversed.

The Chancellor has not jurisdiction to enforce payment from the petitioning creditor of a forfeiture for compounding with the bankrupt. But quære. See the preceding case.

L. C.
LINC. INN.
October 30,
1827.

Ex parte NICHOLLS. — In the matter of SUMMERSETT.

A commission directed to new commissioners cannot issue after judgment by another list of commissioners against the bankruptcy.

THIS petition stated, that in October 1827 a commission had issued against *Joseph Summersett*, upon the petition of the petitioner; but that the commissioners, to whom the same was directed, had refused to adjudicate him a bankrupt, although evidence had been produced to them upon which they ought to have found the bankruptcy; and it prayed that the commission might be resealed, and directed to certain other commissioners, instead of those already named.

The nature of the evidence of the trading, which had been produced to the commissioners (and which had been the subject of doubt), was stated in the petition and affidavit.

Mr. *Rose* and Mr. *Montagu* for the petition, said, that this was a case where the Court would dispense with the strict enforcing of the order of 12th February 1774. (*a*) There was no statutory enactment against such an application as the present, and the rule, which was for general expediency, would not be enforced where the reason of the rule did not apply; and so the Lord Chancellor held in *ex parte Stead*, 1 *G.* & *J.* 3.,

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(*a*) Where any commission has issued, and the commissioners have not found the person against whom it issued a bankrupt, in case another commission be granted (whether on the petition of the same or any other creditor), the secretary do take care that such second commission be directed to the same commissioners to whom the first commission was directed.

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which, in principle, applied to the present case. A commission is a matter of right to the creditor; and if the Court should believe, upon the evidence, that there was a sufficient trading proved to the commissioners, the creditor ought not to be precluded by what should appear to the Court an erroneous judgment of the commissioners. There could no evil result, since the same right would remain to the bankrupt to contest the commission if he were in reality not a trader.

Mr. *Roots* against the application.

The LORD CHANCELLOR.

The rule in *ex parte Stead* does not apply, since, from the number of commissioners actually composing the list, it was impossible that any majority could be obtained. In the present case there was an undisputed majority, who, according to their judgment, decided against the requisites upon which they could open the commission. If I exercised such a jurisdiction at all, it must be upon the clearest evidence only that I could declare the commissioners to have erred. If even probable ground were shewn, it would be a dangerous practice, and there might be no end to the number of commissions taken out upon the chance of the different opinions among the commissioners. At all events, upon the evidence before me, I cannot grant the present application.

L. C.
LINC. INN.
August 16, 1825.

Ex parte GLOSSOP. — In the matter of KEMP.

Petition does not lie to restrain the bankrupt from disputing his commission at law.

THIS was a petition to restrain the bankrupt from proceeding at law to dispute the validity of the commission.

Mr. *Hart* and Mr. *Trollope* for the petition.

The *Solicitor General*, Mr. *Horne*, and Mr. *Montagu*, for the bankrupt, contended, that there was not any jurisdiction by petition. *Flower* v. *Herbert*, 2 *Ves.* 326. They added, that there were indeed three cases where the contrary doctrine had been held: *ex parte Grant*, *Buck*, 92; *Kirkpatrick* v. *Bennett*, 1 *Sim. & Stu.* 408, 1 *Gl. & Jam.* 300; and *ex parte Cutten*, 1 *Gl. & Jam.* 317; but that these cases were not founded on principle.

The LORD CHANCELLOR (*Eldon*), after having examined all the cases, said, he was satisfied that the only remedy was by bill; and he dismissed the petition with costs, without prejudice to filing a bill. (*a*)

(*a*) But see *ex parte Leigh*, in the matter of *Claughton*, *infra*.

Ex parte COLE. — In the matter of HOLE.

V. C.
LINC. INN.
March 30,
1827.

A petition, which upon the face of it does not appear to be by a solicitor, must be properly attested.

THIS was a petition by a solicitor to stay a bankrupt's certificate. The petition was signed "*W. N. Cole*," and the attestation was as follows: "Witness to the signing hereof by the petitioner *William Nicholas Cole*, *Henry Toulmin* his clerk."

Mr. *Montagu*, on behalf of the bankrupt, objected to the attestation, as not being according to the general order of August 12, 1809; and he cited *ex parte Wilkinson*, 1 *Gl. & Jam.* 358.

Mr. *Sugden*, in support of the petition, said, the petitioner being a solicitor, attestation in any form was unnecessary, *ex parte Kingdon*, 1 *Mad.* 446; the defective attestation, therefore, in the present case, was mere surplusage; and though it was not stated in the petition that he was a solicitor, yet the Court will take cognizance of its own officers.

The VICE-CHANCELLOR.

This attestation is in itself bad; and in order to remove that objection where a solicitor is the petitioner, or to explain the absence of attestation, where a solicitor presenting a petition takes advantage of the rule in *ex parte Kingdon*, it must appear upon the face of the petition that he *is* a solicitor. The Court will not take the fact upon information afterwards.

The petition was dismissed with costs.

V. C.
LINC. INN.
March 29,
1827.

Ex parte COUSINS. — In the matter of ADDIS.

Rule as to the liability of the original petitioning creditor for costs, upon substitution of a petitioning creditor's debt.

IN February 1826 a commission issued against *Addis*, upon the petition of *William Davies*, under which he was declared bankrupt. A proof was afterwards tendered by *Davies* of 104*l.*; but his claim, upon being examined by the commissioners, was found insufficient in amount to support a commission.

This was a petition by a creditor who had proved a debt of 152*l.*, and it prayed, that inasmuch as such debt had been contracted not anterior to the debt of the petitioning creditor *Davies*, the commission might be proceeded in upon such debt; and that the costs occasioned by *Davies*, in relation to his alleged debt, might be paid by him.

Mr. *Roots*, for the petition, contended, that as the estate had been burthened with considerable expences in the investigation of the petitioning creditor's debt, and by the necessity of presenting the present petition, he ought to pay the costs who sued out an invalid commission. Though the law now permitted the substitution of a debt, the case did not differ in principle from the common case of a *supersedeas* for want of the legal requisites, in which costs were always ordered against the petitioning creditor.

Mr. *Knight* for the petitioning creditor.

The case differs materially in principle from those to which it is compared. This is an application, not to supersede, but to retain the benefit of the commission.

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Ex parte COUSINS. In the matter of ADDIS.

In the clause of the new act which gives them this privilege there is no mention of costs, and it is extremely doubtful whether in such cases the Court has jurisdiction to give costs.

The VICE-CHANCELLOR. (*a*)

My impression upon first reading the clause was, that the omission of all reference to costs did not allow me to order them. I am of opinion, however, that I am not bound by such omission; and although the present case does not appear to be one where that jurisdiction should be enforced, the rule I shall adopt will be this: — that if upon the evidence it appear that the commission failed through the mistake of law or of fact by the petitioning creditor, then the costs to be paid out of the estate; but if it be proved to have been in consequence of the misconduct or fraud of the petitioning creditor, then he shall pay the costs occasioned by such fraud, and of the consequent application to this Court.

The order in this case was, that upon the major part of the commissioners being satisfied that the debt proved by *William Cousins*, or so much thereof as was sufficient to support the commission, was incurred not anterior to the debt of *Davies*, the petitioning creditor, and was a sufficient and existing debt to support the commission, then that the same should be proceeded in: and it was referred to the commissioners accordingly. And it was further ordered, that the petitioner should be paid the costs of, and occasioned by, the said petition, out of the estate and effects of the bankrupt.

(*a*) Sir *John Leach*.

V. C. LINC. INN. *April* 30, 1827.

Ex parte COWDRY and PITT. — In the matter of LEVETT.

Mode of proceeding where the assignees apply as mortgagees for a sale.

THE petition stated, that in January 1826 *Thomas Martin* had lent to *Levett* the sum of 300*l.*, on security of a note of hand, and on a deposit of title deeds. Before any payment was made in respect of this debt, *Martin* died, having appointed the petitioners his executors. In November 1826 the petitioners issued a commission against Levett, under which they were chosen assignees. The petition prayed that the premises might be sold, &c.

Mr. *Beames*, for the petition, called the attention of the Court to the circumstances in which the petitioners were placed. This was of necessity an *ex parte* application, inasmuch as the two characters of executors and assignees being blended in the petitioners, there was no party left upon whom the petition could be served. It was desirable, therefore, from such union of interests in the same persons, that the sale should take place under the immediate direction of the Court, in order to avoid all imputation.

The VICE-CHANCELLOR made the order, as prayed, for the sale, and an account of what was due to the petitioners for principal and interest, and for the application of the purchase money. And he directed that the commissioners should name a solicitor, whose costs were to come out of the estate, who, as if he were sole assignee, was to attend the taking of the account.

Ex parte RIGNOLD. — In the matter of HARVEY.

V. C.
LINC. INN.
April 5,
1827.

An equitable mortgagee is entitled to the produce of the mortgaged estate from the time of presenting his petition for a sale. But quære. See the next case.

A PETITION was presented 15th February 1826, by an equitable mortgagee, for sale of the mortgaged premises. On the 14th of March 1826 the usual order was made, for reference to the commissioners and sale. 29th June 1826, the commissioners certified that the petitioner was equitable mortgagee upon property of the bankrupt, in respect of 35,023*l.* 6*s.* 9*d.* for principal and interest due to the petitioner on the 29th of June, and they ordered notices to be given for the sale of the estate.

This petition stated, that the sum of 35,023*l.* 6*s.* 9*d.* exceeded the estimated value of the mortgaged estate by many thousand pounds. That the mortgaged premises had been, at the time of the bankruptcy, in the occupation of the bankrupt, and the same had ever since been, and still were, in the occupation of the assignees; and that very valuable crops of hay, barley, and wheat were growing thereon, which the assignees had begun to cut.

The petition therefore prayed, that the petitioner, as such equitable mortgagee, might be declared entitled to a lien on the crops growing upon the mortgaged premises since the bankruptcy.

Mr. *Hart*, Mr. *Montagu*, and Mr. *Bickersteth* for the petition.

Mr. *Sugden* and Mr. *Turner contra.*

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Ex parte BIGNOLD. In the matter of HARVEY.

The VICE-CHANCELLOR (*a*), after declaring that the said petitioner *S. Bignold* was entitled to the produce of the lands and estates in the petition mentioned or referred to, from the 15th day of February 1826, being the time of presenting his original petition in this matter, subject nevertheless to his paying or allowing to the assignees the expences incurred by them in the cultivation of the said lands and estates from the same period, ordered that the said assignees should forthwith come to an account before the commissioners for all monies come to their hands, or to the hands of any other person or persons, by their order or for their use; and that in taking of the said accounts the commissioners were to make to the said assignees all just allowances, in respect of the expences incurred by them in such cultivation; and that the amount of what shall be found due from the said assignees, on taking the account, should be paid over by them to the said petitioner; and that the petitioner, and also the said assignees, should be paid their costs of and occasioned by this application out of such proceeds.

(*a*) Sir *John Leach*.

Ex parte ALEXANDER. — In the matter of TILLS.

L. C.
LINC. INN.
June 10,
1827.

An equitable mortgagee is not entitled to the rents and profits of the mortgaged estate previous to the sale.
But quære. See the preceding case.

IN November 1821 a commission issued against *Tills*. In April 1824 an order was made by His Honour the Vice-Chancellor, declaring that the petitioners were the equitable mortgagees of certain premises belonging to the bankrupts, and that the same should be sold before the commissioners. The case is reported, *ante*, vol. i. page 409. In May 1824 the petitioners presented a petition, reciting the above order, and stating that the premises were a very inadequate security for their debt. That since the appointment of the assignee under the commission, he had been in the receipt of the rents and profits of the mortgaged premises. That he had already received the sum of 287*l.*, and that a further sum of 100*l.* for half a year's rent would become due at midsummer then next, which the assignee insisted upon his right to receive.

The petition prayed, that the assignee might be restrained from receiving the half year's rent; or that, in case the same should be received by him, that he might account for it to the petitioner, in part satisfaction of his debt of 3,000*l.*, and that he might be restrained from receiving any future rents and profits to accrue due in respect of such premises, from the midsummer then next until the sale thereof, or that a receiver might be appointed.

In June 1824 a petition of appeal was presented by *King*, the assignee, praying that the order of His Honour the Vice-Chancellor, of April 1824, might be reversed;

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which petition was heard by the Lord Chancellor, November 22, 1826, and was dismissed with costs.

The petition to restrain the assignee from receiving the rents, &c. came on to be heard before the Lord Chancellor, August 16, 1826.

Mr. *Montagu* and Mr. *Hindes*, in support of the petition, contended, that the Vice-Chancellor's order of April 1824, having established the petitioners' claim to be equitable mortgagees of the bankrupt's estate, they were from that moment entitled to the full benefit of their security, as in the case of a decree of foreclosure on a mortgage actually executed. From the date of the order, they were entitled to stand in every respect in the same situation as actual mortgagees, and to receive the rents accruing subsequently to the order, as if they were mortgagees in possession. Should this application be refused, it would be in the power of any hostile assignee, by presenting a petition of appeal, as in the present case, to remain in the receipt of the mortgagee's property so long as he could get the hearing of the petition of appeal postponed.

Mr. *Sugden* and Mr. *Rose* for the assignees.

The Lord Chancellor intimated his opinion to be, that an equitable mortgagee was, under such circumstances, entitled to a receiver; to have an account of the rents and profits, either from the date of the Vice-Chancellor's order, or from a reasonable time within which the assignees might effect a sale of the premises. His Lordship added, that as this was a new and special case, he should deliver his order in writing.

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The case was not mentioned again until the beginning of the year 1827, when the Lord Chancellor was about to resign the great seal; when the parties agreed to abide by his judgment, given after his Lordship's resignation.

Soon after his Lordship's resignation, the following document was delivered to the parties. "The order for sale was made by the Vice-Chancellor in April 1824. The petition (presented in the May following) does not complain of delay in executing the Vice-Chancellor's order — delay in the assignee. This seems to me to reduce the case to a point to which I have not been able to learn that there is in bankruptcy any precedent; for allowing a creditor not in possession to obtain an order, not only for sale of the estate, but also to be allowed in the meantime by himself, or, if an equitable mortgagee, by a receiver, to obtain, in diminution of his debt, the rent which had or should become due before the sale.

"There is a difference between a mortgagee of the legal estate, and also between the mortgagee of the equitable estate suing in a cause, and the latter applying for an order in bankruptcy. The latter obtains what the two former cannot obtain in a cause, though the equitable mortgagee in a cause may obtain a receiver; but neither species of mortgagee in a cause obtains a sale; the decree being for foreclosure. The rule of Court, as to the relief given to equitable mortgagees, has long been settled: and the Court's orders are the best expositors of that rule. If precedent can be produced to prove that the Court has given such relief as this petition prays, that precedent should be furnished; if there be no precedent, the petition must be dismissed with costs. If

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there be a precedent, let the order or orders establishing it be produced.

"*Eldon.*"

With this interlocutory order the parties were dissatisfied, and declined to search for precedents; and the case now stands for re-argument before the present Lord Chancellor.

L. C. WESTM. HALL, *June* 30, 1827.

Ex parte THOMAS. — In the matter of TURBERVILE.

A bankrupt who is disputing the commission at law cannot, although non-suited, be compelled to convey.

PETITION by the assignee to compel the bankrupt to join in the conveyance of his real estates, according to st. 6 G. 4. c. 16. s. 78.

The commission issued January 1824. Lands were sold to different purchasers in May 1824. In April 1825, the bankrupt petitioned to supersede his commission, upon the ground of his not having been a trader. The petition came on to be heard before the Vice-Chancellor, who ordered it to stand over, with liberty to the bankrupt to bring his action. An action was brought by the bankrupt, and the venue was laid in Middlesex. The assignee obtained a rule from the Court of Common Pleas to change the venue from Middlesex to Hereford; but the rule was subsequently discharged, the bankrupt undertaking to give material evidence in Middlesex. In February 1826 the action

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came on for trial before Lord Chief Justice *Best*, when the bankrupt, failing to give material evidence in Middlesex, was nonsuited. In November 1826 the bankrupt commenced another action in the Court of King's Bench, to which the petitioner appeared, and obtained a rule to shew cause why proceedings in such last-mentioned action should not be stayed until the costs of the first action should have been paid; which rule was afterwards made absolute. The costs in the first action had not yet been paid or tendered. The conveyances of the real estates were prepared, and the purchasers ready to complete their contracts and pay the residue of the purchase money, upon having effectual conveyances properly executed to them. To these conveyances the bankrupt was made a party, and his joining in their execution was required by the purchasers, but the bankrupt refused to join in such execution. The petition therefore prayed that he might be compelled to execute the conveyances in favour of the purchasers.

Mr. *Knight* for the petition.

The LORD CHANCELLOR.

Under present circumstances, I am of opinion that I cannot make the order prayed. The act says that it shall be lawful for me, "upon the petition of the assignees, or of any purchaser from them of any part of the bankrupt's estate, if such bankrupt shall not try the validity of the commission, or if there shall have been a verdict at law establishing its validity, to order the bankrupt to join in any conveyance of such estate, or any part thereof." The nonsuit cannot be said to have established its validity; and the action which he

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has now brought for the purpose of contesting its validity, and which is now pending, he is prevented by the petitioner's own act from prosecuting to trial.

Order refused.

V. C. LINC. INN. *August* 9, 1827.

Ex parte WINDOW. — In the matter of ROWE.

Where a petition is ordered to stand over until after a trial, there need not be a new petition for further directions.

A PETITION had been presented by the bankrupt to supersede. The Court directed that the validity of the commission should be tried at law, and that in the meantime the petition should stand over.

The bankrupt never proceeded to a trial at law. The present petition was presented to dismiss the bankrupt's petition.

Mr. *Horne* and Mr. *Richards* for the petition.

Mr. *Montagu*, for the bankrupt, contended that the petition now before the Court was altogether unnecessary, and therefore the costs ought not to be thrown upon the bankrupt. The practice of the Court in ordering, in such cases, the bankrupt's petition to stand over until the trial at law, is, that the order consequent thereupon might be made upon that petition, and the expence of another saved. In case of the non-prosecution by the bankrupt of the object for which his petition stood over, the order sought by this petition might be obtained in the same manner.

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Ex parte WINDOW. In the matter of ROWE.

Mr. *Horne* said, the respondents on the original petition had no other resource, as it was not in their power to bring on an adverse petition.

The VICE-CHANCELLOR. (*a*)

The petitioners must, in the present instance, have their costs; but in future let the practice be, that in all cases like the present, the petition shall, upon application by the respondents, be put in the paper. When called on, it may be stated to the Court what has been done, and the petition be dismissed.

Ex parte GOODALL.—In the matter of GOODALL and TURNER.

V. C. WESTM. *Nov.* 17, 1827.

The bankrupt is not entitled to allowance, unless a sufficient dividend be paid upon the joint and the separate estate.

THIS was a petition, by one of two partners who had obtained his certificate, for his allowance. The separate estate of the petitioner had paid twenty shillings in the pound, and a surplus had been paid over to the joint estate. The joint estate had paid 3*s.* 7*d.* in the pound.

Mr. *Whitmarsh*, for the petition, submitted, that as the act 6 Geo. 4. c. 16. s. 128. provides, "that if the net produce of the bankrupt's estate shall pay the creditors who have proved under the commission ten shillings in the pound, he shall be allowed five per cent. out of such produce." It was also provided, by sec. 129, "that in all joint commissions, under which any partner shall have obtained his certificate, if a sufficient dividend

(*a*) Sir *John Leach*.

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shall have been paid upon the joint estate, and upon the separate estate, of such partner, he shall be entitled to his allowance, though his partner shall not." The force of the expression, "upon the joint estate and upon the separate estate," warranted him in submitting, that the dividends paid upon each estate should be thrown together, and the average taken: the mean amount of 20*s.* and 3*s.* 7*d.* was more than ten shillings in the pound, and the bankrupt in consequence entitled to his allowance.

The application was not opposed by the assignees, who submitted to the order of the Court.

The VICE-CHANCELLOR did not consider the clause in sec. 129. capable of the construction put upon it by Mr. *Whitmarsh;* but that the joint creditors and the separate creditors must respectively have received the full amount of dividends before the proportionate allowance specified in sec. 128. could be claimed.

Ex parte GEORGE DRAYCOTT and ANNE his Wife. — In the matter of ARCHER.

V. C. LINC. INN. 1827.

A covenant by the husband to secure to his wife an annuity during her life in case she should survive him, is a sufficient consideration to support a grant of an annuity from the wife's father.

BY indenture, dated 27th September 1825, made between the petitioner *George Draycott* of the one part, and *William Archer* (the bankrupt) of the other, and reciting that a marriage had been long since had between the petitioners *George Draycott* and *Anne* the daughter of the said *William Archer*, it was witnessed, that in consideration of the covenant thereinafter contained on the part of *William Archer*, the said *George Draycott*, for himself, his heirs, &c. covenanted with the said *William Archer* to pay or secure to the petitioner *Anne Draycott*, during her life, in case she should survive her husband, an annuity or yearly sum of 50*l.*, to be for her sole and separate use; and the petitioner *George Draycott* did thereby, for himself, his heirs, &c. further covenant with the said *William Archer*, that in case the petitioner *Anne Draycott* should at any time thereafter, by reason of any future act of infidelity of the petitioner *George Draycott*, or on account of any other reasonable or justifiable cause, think proper to withdraw herself from the society and dwelling of her husband, then that he the said *George Draycott* should pay to the petitioner *Anne Draycott*, and her assigns, during such period of the joint lives of the petitioners as they should thenceforth continue separate, one annuity or yearly sum of 50*l.* in lieu of alimony. And further, that in case the petitioner *Anne Draycott* should, in consequence of any future act of infidelity on the part of her husband, withdraw herself from his society and dwelling, that he should not prosecute the petitioner *Anne Draycott* in

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any ecclesiastical or other court for so living separate and apart from him, nor sue or prosecute, or commence any action or proceeding against the said *William Archer*, or against any other person, for receiving, maintaining, or otherwise protecting the said *Anne Draycott* during such separation. And it was further witnessed, that in consideration of the covenants therein contained, the said *William Archer* did, for himself, his heirs, &c. covenant to pay to the petitioner *Anne Draycott*, during her life, one annuity or yearly sum of 50*l.* for her own sole and separate use. And further, that he the said *William Archer*, his heirs, executors, &c. would at all times thereafter acquit and indemnify the petitioner *George Draycott* from all obligation or responsibility for or on behalf of his wife, in respect of any debt or demand which might arise, accrue, or subsist during such time as the petitioner *Anne Draycott* should be living separate from her husband for the cause or causes aforesaid, during such time as the annuity thereinbefore covenanted to be paid by the petitioner *George Draycott* to his wife during such separation, should be payable and paid. And it was further provided, that in case any part of the said annuity, or yearly sum of 50*l.* thereby covenanted to be paid by the said *William Archer*, should be in arrear and unpaid for the space of twelve calendar months from the day the same was made payable, then and from thenceforth, but without prejudice to the exercise of any rights or remedies to which the petitioner *George Draycott* should be entitled against the said *William Archer*, for or in respect of any previous breach or non-performance on his part of the said indenture, the petitioner *George Draycott* should be absolutely released and discharged from the agreement on his part.

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Before any payment had been made by *Archer*, in respect of this annuity, he was declared bankrupt, there being at that time half a year's payment in arrear.

The annuity had been valued at the sum of 744*l.* 3*s.*, for which the petitioner, *George Draycott*, having obtained an order for that purpose, applied to prove under the commission; but the commissioners rejected the proof, on the ground that the indenture was illegal and void, and as being contrary to public policy. They allowed, however, a claim to be entered.

The petition prayed that the value of such annuity, together with the arrears, might be proved under the commission.

Mr. *Pemberton* and Mr. *Swann* contended, that the annuity ought to be proved, inasmuch as the consideration for the grant was perfectly good and legal. There could be no doubt that such a deed, executed upon actual separation, would have been valid; and it must be remembered, that such a separation was only contemplated in case of the wife's having a justifiable cause for withdrawing from her husband, (such as the Courts would decree a separation for,) and that the annuity was in lieu of alimony, which would be awarded to her were she separated for such causes as are contemplated in the deed, viz. such as would warrant a divorce; and they cited *Lord Rodney* v. *Chambers*, 2 *East*, 283; *St. John* v. *St. John*, 11 *Ves.* 537; *Tytley* v. *Durant*, 7 *Price*, 577; *Ekworthy* v. *Bird*, 2 *Sim. & Stu.* 372; *Worall* v. *Jacob*, 3 *Mer.* 256.

Mr. *Montagu*, against the petition, contended, that the deed was void. 1st, Because it was against the policy

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of the laws relating to marriage; as it was a prospective, and not a retrospective, stipulation for a provision in the event of separation; and in support of this position, he relied upon the cases of *St. John* v. *St. John*, 11 *Ves.* 526; *Titley* v. *Durant*, 7 *Price*, 577; Earl of *Westmeath* v. Countess of *Westmeath*, 1 *Jacob*, 126; *Hindley* v. *Westmeath*, 6 *Barn. & Cresw.* 200; and he submitted, that the cases cited in support of the petition did not apply, inasmuch as they only established the validity of a deed, executed upon the actual separation between the husband and wife.

2dly, He contended, that it was a fraud upon the creditors, by assigning, on the eve of bankruptcy, without any, or at most for a colourable consideration only, the property to which the creditors were entitled; and although, under pretence of a consideration, there was a covenant by the husband to pay to the wife an annuity of 50*l.* during her life, yet that it was only colourable, because it was to be void in the event of nonpayment by the bankrupt — an event which was nearly certain.

August 15, 1827.

The VICE-CHANCELLOR (Sir *Anthony Hart*) observed, that if the commissioners were right in rejecting the proof, they were, in his opinion, right for a wrong reason. He could not consider this agreement as against the policy of the marriage laws; but, on the contrary, a perfectly good and legal covenant, upon which an action might have been maintained against the bankrupt had he continued solvent. The difficulty which occurred to him was, whether the agreement were not a fraud upon the creditors. No evidence, it was true, had been adduced to shew that *Archer* was insolvent at the date of the deed; but it appeared to him a voluntary

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deed, within the principle of the case of the assignees of *Gardner* v. *Shannon* (*a*), and must not, therefore, be admitted to the injury of the *bonâ fide* creditors. That this seemed not to have occurred to the commissioners. His Honour, therefore, desired the case to stand till a future day, to be spoke to as to that point.

On the 4th of Dec. 1827 the case was re-argued before Sir *L. Shadwell*, Vice-Chancellor, who said, that there was no necessity to express any opinion as to the validity or invalidity of this settlement, from its being consistent or inconsistent with the policy of the laws relating to marriage, as there appeared to him, by the covenant of *George Draycott* to pay or secure to be paid to *Anne Draycott* during her life, in case she should survive her husband, an annuity of 50*l.* for her sole and separate use, to be a sufficient consideration to support the settlement; and he therefore granted the order prayed.

L. C. WESTM. *May* 19, 1827.

A separate creditor is not entitled to interest from the surplus until joint creditors shall have been paid in full.

Ex parte MINCHIN and others. — In the matter of MINCHIN, CARTER, and KELLY.

THE petition stated, that in September 1819 a commission issued against *Minchin*, *Carter*, and *Kelly*, of Portsmouth, bankers; and that the usual order was made for the respective separate creditors to be at liberty to prove their several debts, and for their respective separate estates being applied, in the first place, to the satisfaction of their several separate creditors. That the petitioner and *James Goodeve* were, at the date of the

(*a*) 2 *Sch. & Lefr.* 228.

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commission, bond creditors of the bankrupt *Minchin*, in the sum of 1,600*l.*, which debt they had proved against his separate estate, together with interest up to the date of the commission; and that they and all the other separate creditors had since received 20*s.* in the pound upon their respective proofs, and that there remained a considerable surplus of such separate estate to be applied according to law. That the petitioners were advised, that, according to the provisions of 6 Geo. 4. c. 16. s. 132., such surplus was, in the first place, applicable to the payment of interest at five per cent. on their said debt of 1,600*l.*, from the date of the commission until the first dividend; and from that time until the next dividend, upon the principal sum reduced by the payment of such dividend, and so on until the whole interest was paid; but that the commissioners had rejected the petitioners' claim, and ordered that the surplus of such separate estate should be carried to the joint account of the bankrupts, and applied in payment of 20*s.* in the pound upon the joint debts, previous to the allowing of interest upon the separate debts. This, the petitioners submitted, was not the true construction of the statute, and prayed that their claim to interest in manner aforesaid might be allowed.

Mr. *Wright*, for the petition, cited *ex parte Higginbottam*, 2 *Gl. & Jam.* 123, as to the mode of computing the interest, and contended, that s. 132. of 6 Geo. 4. c. 16. relating to the payment of interest in cases of surplus, entitled the petitioner to payment of interest on his separate debt out of the surplus estate, before any part of it was applicable to the payment of the joint creditors; and he observed, that under the bankruptcy acts, which were repealed by the 6 Geo. 4., the allowance of interest, in case of a surplus fund, was first introduced in

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Sir *Stephen Evance*'s case, [*Bromley* v. *Goodere*, 1 *Atk.* 75], *ex parte Hill*, 11 *Ves.* 654; and though Lord *Eldon* has on several occasions said, it was difficult to say how the Court was ever induced to give interest in any case, yet he also stated, that he always understood the rule in bankruptcy to be, that debts carrying interest by contract, and no other, should be entitled to interest. *Ex parte Williams*, 1 *Rose*, 401; *ex parte Koch*, 1 *Ves. & B.* 342; *ex parte Boyd*, 1 *Gl. & Jam.* 285. In this case the bond is expressly made payable with interest, and as, by the rules in bankruptcy, the principal due on the bond is payable out of the separate estate, before any part of that estate becomes applicable to the joint creditors, so also, after payment in full of the joint creditors, the interest on the separate debt ought to be paid from the surplus of the separate estate, before any part of it be applied for the benefit of the joint creditors, especially as the new matter introduced into the 6 Geo. 4. expressly provides, in case of a surplus, that "all creditors, whose debts are now by law entitled to carry interest, in the event of a surplus, shall first receive interest on such debts at the rate of interest reserved or by law payable thereon, to be calculated from the date of the commission; and after such interest shall have been paid, all other creditors who have proved under the commission shall receive interest on their debts, from the date of the commission, at the rate of four pounds *per centum*." And he contended, that if the interest due to the petitioner were not first paid, he became entitled to no other benefit, under the language of this section, though a claimant primarily on the separate estate, than the joint simple contract creditor, whose debts were primarily payable out of the joint and not the separate estate; and that there was no ground to contend, that the joint creditors, who should

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receive 20*s.* in the pound, should be paid interest on their simple contract debts out of the separate estate, to the exclusion of or concurrently with the separate creditors, who had stipulated for the payment of interest by their securities. For these reasons he contended that the above-cited section made the interest upon this bond a debt, in respect of which, after all creditors were paid 20*s.* in the pound, the petitioner was entitled to a preference, by payment out of the surplus fund, and to postpone the payment to the joint creditors till his interest was fully paid, in the same manner as he was entitled, under the repealed statutes, to have the principal money paid to him before any part of the separate estate could be applied in payment of any part of the joint debts.

The principle, as to the payment of interest upon bonds proved under commissions, is laid down by Sir *W. Grant,* Master of the Rolls, in *Butcher* v. *Churchill,* 14 *Ves.* 573.

Mr. *Montagu* against the petition.

The LORD CHANCELLOR said, that as the law was before the late bankrupt act, he conceived the rule as to interest, in a case like the present, was completely settled by Lord *Eldon* in *ex parte Reeve,* 9 *Ves.* 588; and he did not think that the allowance of interest under the new act, upon debts on which interest was not previously payable, had varied the former rule as to the application of the surplus of the separate estate after payment of 20*s.* in the pound upon the separate debts; and he ordered the petition to be dismissed with costs.

Ex parte SMITH. — In the matter of SMITH.

L. C.
LINC. INN.
June 25,
1827.

When the petitioning creditor may compound.

THIS was a petition by the bankrupt to supersede, after he had passed his last examination. The petitioner's debts amounted to 1,960*l.* 15*s.* 9*d.*, and his available property in the hands of his assignee to 4,142*l.* Except the petitioning creditor, and one *Henry Rowe*, the petitioner was indebted to two persons only, whose debts together did not amount to 61*l.*, and who had declined to prove. *Rowe* consented to the *supersedeas*, and the petitioner had, at a public meeting of the commissioners, offered, through his solicitor, and was still ready to pay, the petitioning creditor the whole amount of his debt, interest, and costs.

Mr. *Tamlyn*, for the petition, said, that although the bankrupt was entitled to have his commission superseded upon the terms which he had offered, yet those terms had been rejected by the petitioning creditor, from a dread of the penal clause in the 8th section of the bankrupt act. (*a*)

(*a*) "That if any such trader, liable by virtue of this act to become bankrupt, shall, after a docket struck against him, pay to the person or persons who struck the same, or any of them, money, or give or deliver to any such person any satisfaction or security for his debt, or any part thereof, whereby such person may receive more in the pound in respect of his debts than the other creditors, such payment, gift, delivery, satisfaction or security, shall be an act of bankruptcy; and if any commission shall have issued upon the docket so struck as aforesaid, the Lord Chancellor may either declare such commission to be valid, and direct the same to be proceeded in, or may order it to be superseded and a new commission may issue, and such commission may

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Mr. *Montagu*, for the petitioning creditor, did not oppose the application. He admitted that such was the impression entertained of the effect of the section referred to by Mr. *Tamlyn*, and that the petitioning creditor did not feel secure in receiving the debt without the order of the Court.

The LORD CHANCELLOR observed, that the words of that clause were never intended to bear the construction which had been put upon them by the advisers of the petitioning creditor; and that, if the effect of the clause was generally so understood, it was desirable that the act should in that part be amended.

It was ordered, that upon the petitioner's paying to the petitioning creditor the full amount of the debt proved, and the costs of issuing and prosecuting the commission, and of the present application, the payment of such debt and costs to be verified by an affidavit to be filed in this matter, the commission should be superseded.

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be supported either by proof of such last mentioned or any other act of bankruptcy; and every person so receiving such money, gift, delivery, satisfaction or security as aforesaid, shall forfeit his whole debt, and also repay or deliver up such money, gift, satisfaction or security as aforesaid, or the full value thereof, to such person or persons as the commissioners acting under such original commission, or any new commission, shall appoint, for the benefit of the creditors of such bankrupt."

MITCHELL *v.* KNOTT and another.

V. C. LINC. INN. *July* 17, 1827.

Bill does not lie to set aside an execution obtained by nil dicit. The remedy is by petition.

THIS was a bill by the assignees against the execution creditor and the sheriff, to set aside a judgment obtained by confession, or *nil dicit*, upon which execution had issued a few days prior to the bankruptcy; and it prayed, that the defendant might be declared not to be entitled to the benefit of such execution, as against the creditors of the bankrupt, but only to be entitled to be paid his debt rateably and in proportion with the creditors proving under the commission.

To this bill the defendants put in a general demurrer for want of equity.

Mr. *Horne* and Mr. *Whitmarsh*, for the plaintiffs, contended, that inasmuch as the 108th section (*a*) of the bankrupt act had not declared that such a judgment was void, but only voidable, and the use of the process taken from the single creditor for the benefit of all, this was the only mode by which the provisions of the clause could be enforced. That there was no remedy at law where the execution was good, nor by petition in bankruptcy, since it must affect parties entirely *dehors* the commission, and could not comprehend the whole remedy without the aid of an action of trover, which was

(*a*) "Provided that no creditor, though for a valuable consideration, who shall sue out execution upon any judgment obtained by default, confession, or *nil dicit*, shall avail himself of such execution to the prejudice of other fair creditors, but shall be paid rateably with such creditors."

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not applicable to a case like the present, where the goods could not be identified, neither could the account be taken in a Court of law. A bill in equity, on the contrary, embraces the whole remedy without any circuity, and gets back the property, accompanied by a declaration of the rights of the parties. And they cited *Taylor* v. *Taylor*, 5 *Barn.* & *Cresw.* 392. (*a*)

Mr. *Sugden* and Mr. *Knight* in support of the demurrer.

The VICE-CHANCELLOR. (*b*)

The case of *Taylor* v. *Taylor* gives me an impression contrary to the doctrine which it is cited to support. The great object of the late bankrupt act is to facilitate the administration of the bankrupt's property, and that object is not likely to be aided by admitting bills in equity. My inference from the case of *Taylor* v. *Taylor* is, that the execution must be resisted by the assignees, by petition, upon which the question of law must be raised. My opinion is, that the demurrer must be allowed.

(*a*) See also *Wymer* v. *Kemble*, 6 *Barn.* & *Cresw.* 479.

(*b*) Sir *A. Hart.*

Ex parte NOLTE and others. — In the matter of CROWDER and Co.

LINC. INN. *Dec.* 11, 1826.

THE petitioners carried on business as partners at New Orleans. Their petition stated, that *James Clough*, a partner in the firm of *Crowder*, *Perfect* and *Clough*, at Liverpool, came to Charleston for the purpose of promoting the trade and mercantile operations of *Crowder* and Co.; and as a partner on behalf of such firm, and by virtue of a general authority to him, entered into a joint speculation with *Weyman* and *Lazarus* of Charleston, to buy cotton, and to sell it on the spot when the price of cotton should rise. In execution of such speculation *Weyman*, with *Clough* acting on behalf of *Crowder*, *Clough* and Co., authorized *Lazarus* to proceed to New Orleans, and there to buy cotton, and to apply to the petitioners to act in the matter as agents on commission. *Weyman* wrote to *Lazarus*, previous to his leaving Charleston for New Orleans, the following letter: — "May 14, 1825. Dear Sir, — As you are about embarking for New Orleans, for the purpose of purchasing cottons, the present is to authorize your drafts, at such sight as you may find convenient, on *J. M. Cutlin* and Messrs. *Coffin* and *Weyman* of New York, or on me at this place, for any amount you may wish to invest; it being clearly understood that the said investment is on the joint account of *J. Clough*, you, and myself, in equal proportions. I have now only to wish you a successful trip, and that you will be able to purchase at least 10,000 bales of cotton. Yours, &c. *J. T. Weyman.*" *Lazarus*, upon his arrival in New Orleans, about the 26th of May 1825, proposed to the petitioners that they should act as agents on commission for the

A partner may give a guarantee where the obligation has reference to business connected with the partnership, and where the guarantee is notified to the firm, and they do not dissent from it.

Where different firms are engaged in a joint adventure, the creditors of the adventure may prove against the joint estates of the minor partnerships.

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parties interested, and at the same time shewed the petitioners the said note of *Weyman*, and also presented the following letter, addressed to the petitioners by *Clough*:— "Charleston, 14th May 1825. Dear Sirs,—This, I trust, will very shortly introduce to you my friend Mr. *Michael Lazarus* of this place, who is on the point of embarking for your port. The great object of his visit is, to have as much cotton bought up without delay as can conveniently be done under existing circumstances, provided you have no later European intelligence than what he is possessed of, so as to have advanced your prices beyond the rates at which he may think it prudent to operate. If you feel inclined to take one fourth interest in this adventure, in preference to acting on commission, we, that is Mr. *J. T. Weyman* of this city, Mr. *Lazarus*, and myself, who are so far to be equally and jointly concerned on the occasion, shall be happy to act with you on that understanding. Mr. *Lazarus* will communicate to you the news received here yesterday by the General Brown from Liverpool, which has induced this undertaking and the object we have in view, which is to buy, and resell on the spot when n advance occurs, which must we conceive take place to a considerable extent ere long, from the general tenor of the Liverpool accounts. The hurry of the moment will not permit of our arranging any extensive financial scheme for the occasion; but *I pledge myself and my house in Liverpool to you against any loss that may by any possibility occur, upon the interest of my friends here and myself in this business;* in aid of which you may value for my account on Messrs. *Le Roy* and Co. of New York, for 10,000 dollars, and on Messrs. *Schmidt* and Co. there also for 10,000 dollars, at not less than twenty-one days sight. I write to Liverpool this day, to open a credit for you on *Crowder, Clough* and Co.

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there, for from 10 to 20,000*l.* sterling, payable in London, if an opportunity should offer of disposing of bills on England, to further the object in view about which we feel much anxiety, as it may probably be the last opportunity that will offer this season for any favourable operation of the kind. I would, therefore, solicit your prompt and decided attention to the attainment of our wishes on the occasion. Should any call for bills on this place enable you to negociate on my friend Mr. *Weyman*, I beg to assure you that he is in every respect worthy your confidence, and will duly protect any bills you may draw on him for the purposes of this undertaking. I am, &c., *J. B. Clough.*" That previously to the receipt of this letter the petitioners had been totally unacquainted with *Lazarus* or *Weyman*, but were acquainted with *Clough* as a partner in the firm of *Crowder, Clough*, and Co., with whom the petitioners had previously had considerable dealings, and in whose credit and responsibility they had great confidence. That the petitioners, fully believing that *Clough* had entered into the speculation on behalf and by the authority of the firm of *Crowder, Clough* and Co., and that the firm was, as well as *Lazarus* and *Weyman*, responsible for the whole risk and expence thereof, immediately upon receiving the said letter and proposal, agreed to undertake the purchase of the cotton as agents, but declined taking any share in the speculation as partners, and agreed with *Lazarus* for the terms and rates of charges, for which the petitioners undertook the commission, which rates of charges were communicated to *Clough*, and also to *Crowder, Clough* and Co., and fully approved and agreed to by them respectively. That in pursuance of such arrangements, the petitioners, between the 26th May 1825 and the 30th June 1825, purchased, on behalf of the parties

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interested, cottons to the amount of 180,000*l.* sterling. That in order in some degree to meet such advances and liabilities the petitioners did, on the 31st of May 1825, by the authority of the said *Clough*, *Weyman* and *Lazarus*, draw upon *Crowder*, *Clough* and Co. four bills of exchange, amounting to 20,000*l.*, which bills were afterwards duly accepted by *Crowder*, *Clough* and Co., and which bills were alluded to in the following letters of 1st June and 16th July 1825.

"GENTLEMEN, New Orleans, 1st June 1825.

"We beg leave to enclose to you a copy of a letter from your Mr. *James B. Clough*, received on the 26th ult., through the hands of Mr. *Michael Lazarus*, who arrived here that day by an express pilot boat from Charleston. We further enclose herewith the copy of a letter addressed by us to Mr. *Lazarus*, containing, as you will perceive, the terms and conditions upon which we have undertaken to execute the extensive views of the parties concerned with Mr. *Lazarus*: and in addition to this gentleman's own communication, we have now to state, that we succeeded, during the first twenty-four hours, in laying our hands on six hundred bales of cottons, at various prices; and that we have, now that the competition excited by this purchase has subsided, and the market returned to the inactivity in which we had the good fortune to find it while striking the blow, the prospect of adding 12 to 1500 bales more to this investment. We are at this moment too much engaged to enter into any detail of the nature and character of our purchases; but we may be permitted to add, that Mr. *Lazarus* has expressed his extreme satisfaction with what has been done, and that, as the times go, the cottons are well worth the money. Availing ourselves of the authority con-

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veyed to us by Mr. *Clough*'s letter, we have valued upon you yesterday, as follows:

No. 505	£ 5,000	Favour *Baring, Brothers*, & Co.	a 60 ds.
506	5,000	of same	a 70 ds.
507	5,000	*T. & W. Earle* & Co.	a 80 ds.
508	5,000	*T. & J. D. Thornley*,	a 90 ds.

£ 20,000 payable in London, which we recommend to your protection.

"We shall in a few days have the opportunity to address you again; and we are preparing a circular for the press, which shall be transmitted to you as usual.

"We are, &c.

"*Vincent Nolte* and Co."

In this letter was enclosed, to Crowder, Clough and Co., Clough's letter of the 14th of May 1825, and also the copy of a letter written and sent by the petitioners to *Lazarus*, the terms and rates of charges, which letter and the copies enclosed was received by *Crowder, Clough* and Co. some time before the 16th of July 1825; and no objection was made, or disapprobation expressed, at the terms or contents thereof. In reply to the letter of the 1st of June, *Crowder, Clough* and Co. wrote a letter, dated 16th July 1825, which was received by the petitioners in September following, and which was as follows: — "Gentlemen, — We have the receipt of your favour of the 1st of June, with circular of the 3d, and copy of your arrangement with Mr. *Lazarus*, as to the purchase of a large quantity of cotton for resale, on the joint account of that gentleman, Mr. *Weyman*, and ourselves. In the present state of our market, this was by no means welcome intelligence; but as you would have an opportunity of reselling on the arrival of the 23d April accounts, we can only trust in your well-known activity, not doubting but you would embrace the first

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opportunity of realising a part, if not the whole. Your drafts for 20,000*l.* will meet due honour. Two for 5,000*l.* each have already appeared, and been protected. You may well suppose we shall await the result of this adventure with no little anxiety. The heavy arrivals this week, amounting to nearly 40,000 bales, have had the effect of checking a demand which had commenced some days ago. We are," &c., *Crowder, Clough* and Co."

The petition further stated, that the firm of *Crowder, Clough* and Co., besides the above letter, had admitted in various ways, by letter and otherwise, that the speculation had been entered into by *Clough* as a partner in and on behalf of the firm of *Crowder, Clough* and Co.; and in particular that *Thomas Crowder* had frequently in conversation spoken of the probable results of the speculation of *Clough*, as a matter in which he (*Crowder*) and the rest of the firm were deeply and pecuniarily interested, as being the concerns of the firm. After such cottons had been purchased, the parties interested had found themselves disappointed in their expectations of a rise in the prices at New Orleans; and the parties thereupon agreed, that it would be for their interest that the cottons should be shipped to Europe for the purpose of being sold. The petitioners, in pursuance of the directions, shipped on board various vessels, and sent to England, various parts of the 7,305 bales of cotton; and as they shipped such cargoes respectively, drew upon *Crowder, Clough* and Co. bills of exchange for the value, but which did not reach England until after the bankruptcy of *Crowder, Clough* and Co. In August 1825 a commission issued against *Crowder* and *Perfect*, and shortly afterwards a commission issued against *Clough*.

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The petition prayed, amongst other things, for liberty to prove against the joint estate of *Crowder*, *Clough* and *Perfect*.

On the 11th of December 1826 the petition was heard before Sir *John Leach*, Vice-Chancellor.

Mr. *Montagu* and Mr. *Kindersley* for the petition.

The joint estate is liable, 1st, because the speculation was, although nominally by *Clough* alone, really by *Clough* acting on behalf of *Clough*, *Crowder* and *Perfect*; so that the partnership liable to the petitioners was *Lazarus*, *Weyman* and *Clough*, i. e. *Clough*, *Crowder* and *Perfect*: and as *Lazarus* and *Weyman* were abroad and insolvent, and there was not any joint estate of *Lazarus*, *Weyman* and *Clough*, the petitioners were entitled to prove against the separate estate of each; which proof, as *Clough* represented *Crowder*, *Clough* and *Perfect* (who would have received the profits), ought to be against their joint estate; and they cited *ex parte Barrow*, 2 *Rose*, 254; and *Bosanquet* v. *Wray*, 2 *Marshall*, 321.

But, 2dly, supposing *Crowder* and *Perfect* not to have been interested in this speculation as partners with *Clough*, they are liable with *Clough* by virtue of the guarantee: upon which the *facts* were, that *Clough* acted in America as agent for the Liverpool house; and in his letter of the 14th of May 1825, he says, "I pledge myself and my house in Liverpool to you against any loss that may by any possibility occur upon the interest of my friends here and myself in this business;" which letter was communicated by the petitioners to the Liverpool house, who not only did not dissent from the undertaking, but

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had again and again verbally confirmed it. Upon these facts the law was clear; for without entering into the enquiry as to the general legal effect of a guarantee of a firm given by one partner of a firm of which he is a member, which was discussed in *Baker* v. *Charlton*, *Peake*, 79; and *Hope* v. *Cust*, cited in *Sheriff* v. *Willis*, 1 *East*, 48; and *Ridley* v. *Taylor*, 13 *East*, 175, it was settled in *Sandilands* v. *Marsh*, 2 *Barn. & Ald.* 673, that, although one partner cannot bind another out of the regular course of dealings by the firm, yet, where the obligation has reference to business transacted by the partnership out of the regular course, it is still within the scope of his authority, and will bind the firm, particularly if the firm recognizes the act.

Mr. *Sugden* and Mr. *Bickersteth* for the respondents.

If *Lazarus* and *Weyman* knew that *Clough* acted on behalf of *Crowder*, *Clough* and *Perfect*, the partnership liable to the petitioners consisted of *Lazarus*, *Weyman*, *Crowder*, *Clough* and *Perfect*; and there not being any joint estate of the five, the proof must be against the separate estate of each. But if *Lazarus* and *Weyman* did not know that *Crowder* and *Perfect* were interested, the proof must be confined to the separate estate of *Clough*. *Ex parte Wyllie*, 2 *Rose*, 393; and with respect to the guarantee, they contended that *Clough* had no authority to bind the firm.

The VICE-CHANCELLOR.

The question is whether, when this partnership was formed, *Lazarus* and *Weyman* knew that *Clough* represented the house at Liverpool. If they did, it was a partnership of the five, and the proof would be against

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the separate estate of each. In the letter which *Clough* writes to *Nolte* and Co., he conceals the fact that his partners were interested; for he represents the transaction as for himself, *Lazarus* and *Weyman*; and then he says, "I pledge myself and my house in Liverpool," &c. from which it appears that the house at Liverpool had nothing to do with the contract but as guarantees. With respect to the guarantees, the Liverpool house, not taking any notice of what is said of a guarantee, correct the representation in the letter which was sent to them, that it was for the joint concern of *Clough*, *Lazarus* and *Weyman*; they say it was not, but for the joint concern of *Lazarus*, *Weyman*, and ourselves; and in that sense alone they propose to pledge their house. I must, therefore, direct an enquiry into the fact.

His Honour was therefore pleased to order, that it should be referred to the commissioners to enquire and state whether, at the time the partnership was formed by *Lazarus*, *Weyman* and *Clough*, the said *Lazarus* and *Weyman* knew that *Clough* represented the house or firm of *Crowder*, *Clough* and Co. at Liverpool.

From this order the petitioners appealed.

The arguments upon the appeal were to the same effect as upon the original hearing, except that, for the appellants, Mr. *Montagu* and Mr. *Kindersley* argued at some length that the case of *ex parte Wyllie* could not be supported; that the principle of the rule making the joint estate liable for the joint debts, and the separate estate for the separate debts, was, that the fund which derived the advantage should sustain the loss: "*Qui sentit commodum, sentire debet et onus;*" and as the persons in that case were *Humble* and *Holland*, *Strickland*, *Brick-*

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wood and *Fawcett*, and as the proceeds of the adventure were received, not by *Holland*'s separate estate, but by the joint estate of *Humble* and *Holland*, there could be no reason why the proof should be against the separate estate of *Holland*, instead of the joint estate of *Humble* and *Holland*.

The LORD CHANCELLOR.

April 2, 1827.

The question in this case is whether the debt can be proved against the joint estate of *Crowder*, *Clough* and *Perfect*, or whether it must be proved against the separate estate of *Clough*. By the enquiry directed by the Vice-Chancellor it seems to be taken for granted that *Clough* did represent the house of *Crowder*, *Clough* and Co. at Liverpool, and the object of the enquiry is to ascertain whether *Lazarus* and *Weyman* knew, not only that he was a partner in that house, but that, in his mercantile transactions in America, he *represented* the house; and I think I can perceive a very rational object in such enquiry. All parties, however, concur in bringing the matter before me for the opinion of the Court without that enquiry.

In deciding this, two questions present themselves for consideration: first, whether the house is not liable, as having been jointly interested; and secondly, whether it is not liable by virtue of the guarantee.

With respect to the liability from joint interest, although it would be a little hazardous to say that as wide an authority was given by the partnership to *Clough* to enter into this speculation, as the authority which he exercised; yet, looking at the other circumstances of the case, are we not justified in saying, that the partners in

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Liverpool, by making themselves liable, have adopted the transaction, and by such adoption have made themselves as responsible as if originally parties to the transaction; whether the Liverpool house has not made itself liable, even as *Clough* individually was liable, independently of the doctrine of guarantee? Then with respect to the guarantee — as it was intimated to me that the Vice-Chancellor looked upon this correspondence not in the light of an adoption of the guarantee, I have somewhat anxiously viewed the case in both aspects; and unless we have been mistaken in what has hitherto been taken as a guarantee with reference to mercantile transactions, I cannot see how this can be looked upon as anything but an adoption of such guarantee by the house of *Crowder, Clough* and Co. *Clough* in his letter says, "The hurry of the moment will not admit of our arranging any extensive financial scheme for the occasion just at this moment; but I pledge myself and my house in Liverpool to you against any loss that may by any possibility occur upon the interest of my friends here, and myself, in this business." The obvious construction of this letter is a pledge that his house at Liverpool shall indemnify them against any loss which might occur on the interest of himself and his friends there — looking upon "himself and his house" as perfectly a distinct body from "himself and his friends." If the question were now trying in a Court of law, whether, after communication of this had been made to the house at Liverpool, supposing they had given no answer to such communication, but had permitted the house of *Nolte* and Co. to go on after having received that pledge, would not a jury be directed to infer that what was not contradicted was accepted?

I quite agree that a partner has no right to guarantee a separate transaction at the expence of the other

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partners, where they are not concerned; but I am at the same time bound by the doctrine of Lord *Mansfield* to say, that a partner may give a guarantee for his partners in a matter that relates to the partnership. If the partners, upon being duly informed of that, accede to his act, it is not the mere circumstance of his having alone given the guarantee, but their having acceded to what he proposed, which constitutes the dealing between them and the parties secured. So if partners are informed of such a measure having been taken by a person who is a partner, though perhaps not in that particular transaction, yet, inasmuch as it may not easily be known to those who deal with such partner in what dealings the other partners are, and in what they are not interested, and they do not think proper, in answer, to state whether they authorized such partner so to act or not, it is not too much to take it for granted that they accede to the guarantee which their partner has proposed.

It appears to me that they did consider themselves as parties interested in the transaction — that is, as having ultimately become parties thereto; for upon that ground only can we understand the expressions in their letters, in which they lament the extent to which the speculation had been carried.

Having regard, then, to these letters, and to the measures taken by *Crowder* and Co. about sending the property to England to be sold, in order to secure the payment of bills which had been drawn, it does appear to me that *Crowder* and Co. were the persons who would have reaped the advantage, had the affair turned out advantageous, and that they are therefore liable to the loss which has occurred; not merely because of their pledge against loss, but because they were interested in

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the concern. After examining this case again and again, my opinion is that *Crowder* and Co. did adopt this transaction for better or for worse; and *Crowder* and *Perfect* having become bankrupts, and *Lazarus* and *Weyman* being abroad and both insolvent, the question now is, amid this mass of insolvency and bankruptcy, what is the remedy open to *Nolte* and Co. The Vice-Chancellor appears to have considered, that if *Lazarus* and *Weyman* knew nothing of the house of *Crowder* and Co. having adopted the situation of *Clough*, it might form a very material consideration between *Lazarus*, *Weyman* and *Clough*, and between *Lazarus*, *Weyman* and *Crowder* and Co.; and His Honour probably was influenced by the doctrine in *ex parte Wylie*. However, supposing *Lazarus* and *Weyman* to have been ignorant, or supposing them to have been cognizant of the fact of the house of *Crowder* and Co. being represented by *Clough*, and that there were five persons concerned instead of three, the question is, how the proof is to be made, regard being had to the fact that *Lazarus* and *Weyman* are both abroad and both insolvent. After the most laborious attention I can give to the case, I am finally of opinion that the petitioners are entitled to prove against the joint estate of *Crowder* and Co.

I feel bound to add, with respect to the case of *ex parte Wylie*, which has been so repeatedly appealed to during the argument, that as the first duty of a judge is to endeavour, in the case before him, to decide rightly,—and that his next is, if in any future case of the like kind he has reason to apprehend that his judgment was not upon such sound principles as it appeared to be when he pronounced it, he should not hesitate to rectify his error,—looking at both these obligations, I feel myself

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bound to state that I must, when I decided that case, have seen it in a point of view, in which, after most laborious consideration, I cannot see it now.

The proof was ordered to be admitted against the joint estate.

V. C. LINC. INN. *April* 11, 1827.

Ex parte NEAL and *ex parte* SIDES. — In the matter of DAWES.

The commissioners may expunge the debt of the petitioning creditor.

THE petition of *Neal* and others stated, that the commissioners had, on the requisition of certain creditors, investigated the debt of 637*l.* proved by the petitioning creditor, and had certified "that there was no debt due from the said *Richard Dawes* to the petitioning creditor, sufficient to support the commission." And it prayed that the commission might be superseded, or that it might be referred to the commissioners, to enquire whether there was a debt proved under the commission sufficient to support the same, and if so, that it might be supported accordingly.

Mr. *Montagu* and Mr. *Rose*, against the petition, objected, that the certificate of the commissioners was insufficient. By the present bankrupt act, section 18, it was provided, that in case the petitioning creditors debt were found insufficient, the commission may be proceeded in upon the debt of another creditor; and by section 60, the commissioners are empowered, in case they shall be of opinion that a debt proved is not due, to expunge the same, either wholly or in part. In the

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present case the commissioners have merely reported, that the debt of the petitioning creditor was not sufficient; but they were bound to proceed to expunge the same either wholly or in part, otherwise the petitioning creditor is incapacitated from appealing against their decision; and they cited *ex parte Chappell*, in the matter of *Williams*, *ante*, 131.

Mr. *Pepys* and Mr. *Swanston* contended, that the clause empowering the commissioners to expunge, was not applicable to the debt of the petitioning creditor, but only to the ordinary cases of proofs under the commission. The petitioning creditor's debt was in a manner doubly proved, by deposition at the opening, and afterwards. The term *proof* applied only to those debts proved after the adjudication, and the commissioners have justly distinguished between them. The effect of section 18 is merely to authorise the Lord Chancellor, in case the debt of the petitioning creditor be found insufficient, to order the commission to be proceeded in upon another debt; and it contains no provision as to expunging.

Mr. *Montagu*, in reply, said, that every reason applicable to other creditors was still stronger when applied to the petitioning creditor. One object of the clause in section 60, was to prevent the expence of a petition to expunge. The deposition of the petitioning creditor before the adjudication, is merely to the fact of his having a debt of sufficient amount to authorise the commissioners to proceed, and never can entitle the creditor to receive dividends until actual proof. In the present case, the debt, not being expunged in the whole or in part, still remains upon the proceedings, and there is no power of appeal.

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The VICE-CHANCELLOR. (*a*)

I am of opinion that the report of the commissioners is defective, and that they ought to have proceeded to expunge the whole, or so much of the petitioning creditor's debt as had been, in their opinion, improperly proved; and for this reason, among others, that the party is otherwise deprived of all power of appealing against the commissioners' decision. They admit tacitly that there is a debt, but do not state what the amount is; and if the Court reverses the effect of the certificate, and it is sent back to the commissioners, still the creditor is in the same difficulty, and compelled to petition again. It is certainly meant by the legislature that the commissioners, after examining the petitioning creditor's debt under section 18, should state the amount. As the practice is new, it is necessary to settle it. It would be highly inconvenient to admit such certificates as the present, leaving the amount of the debt altogether in doubt. It would lead to this evil, that there must in all cases be two petitions, one generally against the sufficiency of the certificate, and another appealing against their expunging the debt, if the commissioners did afterwards expunge it. The commissioners have not sufficiently examined the authority given them by the act, which is not only to ascertain whether the debt be of sufficient amount, but also what is its actual amount.

It was ordered that the petition should be adjourned; and that it should be referred back to the commissioners to review their report, and to certify and state if any and *what* debt was due from the bankrupt to the petitioning creditor *Sides*, with liberty to the said *Sides* to present a cross petition, if he should be advised.

(*a*) Sir *John Leach*.

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A cross petition was presented by *Sides* the petitioning creditor, stating, that in pursuance of the above order a meeting of the commissioners was held, at which the petitioner tendered further evidence in support of his debt; but the commissioners refused to receive the same, and stated that they would certify upon the evidence already taken; and they reported as follows: "We do hereby certify that we have reviewed our former certificate or report, and we do find that there is not any debt whatever due and owing from the said *Richard Dawes* to the said *Thomas Sides*."

The petitioner stated, that he was ready to satisfy the Court, or a jury, upon a trial at law, that such debt was justly due; and prayed that the same might be considered as a valid proof, or that the commissioners might be directed to proceed in examining the evidence which the petitioner was ready to adduce in support of his debt, or to direct a trial at law.

Mr. *Rose* and Mr. *Montagu* for the petition.

Mr. *Pepys* and Mr. *Swanston* against it.

The VICE-CHANCELLOR (*a*) ordered, that it should be referred back to the commissioners to review the said proof, having regard to the order made by His Honour the then Vice-Chancellor, on the 11th of April last; and that the petitioner and the respondents should be at liberty to give any further evidence before the said commissioners.

(*a*) Sir *A. Hart.*

L. C.
LINC. INN.
August 14, 1827.

Ex parte ELLIS. — In the matter of BADNALL.

A partner cannot prove or claim until the joint debts are paid.

BADNALL the elder, *Badnall* the younger, *Spilsbury*, *Cruso* and the petitioner *Ellis*, were in partnership as bankers at Leek. In January 1826 *Ellis*, who had brought a capital of 10,000*l.* into the business, retired from the partnership, having received from the remaining partners a joint and separate bond for 7,000*l.* in satisfaction of what was due to him from the firm. It was agreed that the name of *Ellis* should continue to be used, and that notice of the dissolution should not be published until the first of January 1827. In August 1826 *Badnall* the younger, *Spilsbury* and *Cruso* retired, and notice of the dissolution as to them, and that the business would in future be carried on "by *Richard Badnall* the elder and *Richard Ellis*, on their own account," was duly published; after which *Badnall* the elder possessed himself of the partnership property, and carried on the banking business alone, under the style of *Badnall* and *Ellis*. In December 1826 a commission issued against *Badnall* the younger, *Spilsbury* and *Cruso*, under which they were declared bankrupts, and in June 1827 *Badnall* the elder also was declared bankrupt.

The petition stated that there were outstanding debts due from *Badnall* the elder, but for which the petitioner was jointly liable, to the amount of 4,000*l.*, and he prayed that he might be at liberty to prove the said bond and interest (the proof of which had been rejected by the commissioners), and that the commissioners might be directed to ascertain the amount of the debts for which the petitioner was liable jointly with the bankrupt, with liberty to the petitioner to enter a claim for the

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amount, and to prove and receive dividends upon such debts as he should pay, or against which he should indemnify the bankrupt's estate.

Mr. *Bickersteth* and Mr. *Russell*, for the petition, contended, that a partner might prove against the separate estate of his copartner, whether there were joint creditors or not, since the proof against the separate estate would not interfere with the rights of the joint creditors, as it is not subject to their demand. The separate estate is to be appropriated to separate debts, and among such separate debts is the bond to the petitioner. In *Wright* v. *Hunter* (*a*) where the partner paid his liquidated proportion of the partnership debts to the other partners, who became bankrupt without having applied the whole of the money so received in payment of such debts, the solvent partner was declared to be entitled to prove the whole of the sum so misapplied; and they cited *ex parte Young*, and *ex parte Ogilvy* (*b*), and *Parker* v. *Ramsbottom* (*c*); and added, that as this was a debt which will be barred by the certificate, it would be both inconsistent and unjust to say that such a debt shall not be proved.

Mr. *Rose* and Mr. *Montagu contra.*

It is an unqualified rule that a partner can only prove when he has paid the joint debts. The only case in which this rule was relaxed, was in *ex parte Ogilvy.* But this case was, after great consideration, overruled by Lord *Eldon* in *ex parte Moore* (*d*), and in *ex parte Gibson.* (*e*) The cases at law do not apply, as they

(*a*) 1 *East*, 20.
(*b*) 3 *Ves. & Bea.* 135.
(*c*) 3 *Barn. & Cresw.* 268.
(*d*) *Ante*, page 166.
(*e*) *Ante*, page 233.

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relate to proof only, and involve no question of proof in competition with joint creditors. The point at issue in *Wright* v. *Hunter* was simply this: there was a debt partly due before and partly after the commission, and the question was as to what part was barred by the certificate. The debt which was declared to be proveable by the partner was still liable to the ulterior question whether it could be proved in competition with joint creditors, which it clearly could not. The real question, in fact, is, not whether the debt may not be proveable, which is not denied, but whether the petitioner has placed himself in a situation to prove, by removing all the joint claims, which he does not pretend to have done.

The LORD CHANCELLOR.

The only partner remaining after the retirement of *Badnall* the younger, *Spilsbury* and *Cruso*, was *Badnall* the elder; but for present purposes the petitioner must be looked upon as a partner, since he authorized the use of his name as such. I am of opinion, upon the subject of proof, that the petitioner is not entitled; that the fund out of which the joint creditors are entitled to be paid cannot be diminished. *Parker* v. *Ramsbottom* and the other cases cited do not apply, since this is not an abstract question of proof, but a question of proof in competition with joint creditors — with those to whom the petitioner is an accounting party.

Upon the second part of the prayer, viz. as to the petitioner's entering a claim for the amount for which he is liable, and proving such debts against which he shall indemnify the bankrupt's estate, and in support of which the case of *ex parte Ogilvy* has been cited, I am equally

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clear that this application also must be refused. The case of *ex parte Young* was also cited in *ex parte Ogilvy;* but the Lord Chancellor, by his remark in that case, shewed that he considered it not applicable; and the decision which was ultimately given in *ex parte Ogilvy* was made without argument. The order, however, that was made is in form favourable to the present application; but the question has since come on in a far more serious form, in *ex parte Moore*, and the case of *ex parte Ogilvy* must cease to be looked on as an authority. In *ex parte Moore* Lord *Eldon* says, that unless indemnity be accepted as a *discharge* by the joint creditors, the partner offering indemnity can never be considered entitled to prove as a person liable paying the debt after the bankruptcy within the act of parliament; and until the present petitioner produces such discharge, I can give no relief.

Petition dismissed without costs.

Ex parte CHISMAN. — In the matter of RODEL.

V. C. LINC. INN. *January* 14, 1828.

Mode of proceeding upon an irrelevant or scandalous affidavit.

THIS was a petition to take an affidavit of the respondents off the file, not for scandal, but for impertinence; that is, for containing matter not material to the issue, and for setting out at length an examination before the commissioners of the petitioner and of a witness.

Mr. *Norton* for the petition.

Mr. *Montagu contra.*

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When this petition was first mentioned, it was objected that the petition was not right in form, as it did not state the parts of the affidavit which it was alleged were impertinent; but upon searching the precedents, it was found that the practice had been to state this charge generally.

Mr. *Montagu* then contended, that the Court had never interfered upon such an application; that the proper remedy was for the party not to answer the affidavit, if it be irrelevant; and whatever might be the result of the petition, to apply at the hearing for the costs. *Ex parte Glossop*, 14 *Sept.* 1826. Petition dismissed with costs, except as to one affidavit of the respondent, for which no costs were allowed; it was very long and irrelevant. He added, that if such applications were permitted, the time of the Court would be occupied in hearing, before the petition was ripe for hearing, every affidavit to which the petitioner or the respondent might object; and that it would enable either, by filing an irrelevant affidavit, in the nature of a sham plea, to protract the ultimate hearing of the petition to an indefinite period. That the practice of expunging even scandal had originated in our time, the first case being *ex parte Simpson*, 10th February 1809; and that Lord *Eldon* seeing the evils attendant upon the delay and expence which these applications occasioned, had refused to refer them to a master; saying, that he would himself examine and determine upon the scandal; and that he was in the constant habit of taking and examining and declaring his opinion upon the affidavits.

His Honour the Vice-Chancellor directed precedents to be examined, and the books from the bankrupt office being produced, contained the following cases, *ex parte*

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Simpson, 10th Feb. 1809. (*a*) Petition to refer, as containing matters and charges of a criminal nature, reflecting on the petitioners, and very prejudicial to their characters and reputation, and not only false and unfounded, but also irrelevant, scandalous, and impertinent. *Ex parte Thomas*, in the matter of *Lott*, 9th July 1822. (*b*) A petition to expunge for impertinence only, upon which an order was made by Sir *John Leach*. *Ex parte Matthew*, in the matter of *Cooper*, 17th July 1822. (*c*) A petition to expunge an affidavit, as containing matters and charges which were entirely irrelevant and impertinent to the matters contained in the petition; and which charges reflected upon the petitioner, and were very prejudicial to his character and reputation, and which were not only false and unfounded, but irrelevant, scandalous, and impertinent. *Ex parte Kirkpatrick*, in the matter of *Dennett*, 10th August 1823 (*d*), to refer for scandal and impertinence. *Ex parte John*, in the matter of *Thomas*, 5th August 1825 (*e*), was a petition to refer an affidavit which was of an improper length, and containing a great quantity of impertinent matter. It was referred by Sir *John Leach*, Vice-Chancellor, to the Master; and the report that it was impertinent was, there being no opposition, confirmed.

The VICE-CHANCELLOR remarked, that with respect to the two cases of *ex parte Thomas* and *ex parte John*, they were decisions by Sir *John Leach*, when he was Vice-Chancellor, and it did not appear that they were opposed; and all the other petitions were for

(*a*) MS. Orders in Bankruptcy, vol. 115, page 132.

(*b*) Ibid. vol. 162, page 137.

(*c*) Ibid. vol. 162, page 137.

(*d*) MS. Orders in Bankruptcy, vol. 164, page 192.

(*e*) Ibid. vol. 170, page 124.

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scandal. His Honour was pleased to say, that he would consider and confer with the Lord Chancellor upon the subject, which appeared to him to be of considerable importance; but that upon the present occasion there was no necessity for him to express any opinion, as the affidavit, for which complaint was made, appeared to him not to be impertinent.

There was another application at the same time, and in the same matter, to expunge part of an affidavit as scandalous. It was as follows: —

" That deponent verily believes that the said ——— is not worthy to be believed upon his oath, because about three years ago the said ——— came to deponent to borrow two guineas, and represented that he did so at the particular request of his father, to pay his water rates, to prevent the water being cut off, which deponent accordingly gave him; when it turned out that the father had not so sent the said ———, and the pretence was wholly fraudulent. And also because the said ———, whilst in the employ of Messrs. *S.* & *P.* tea dealers, namely, about twelve months ago, embezzled from the said Messrs. *S.* & *P.* the sum of 70*l.*, and was in consequence dismissed by them from such situation; but the said Messrs. *S.* & *P.* forebore to prosecute, on account of the said ——— having represented that he had a mother and a large family to provide for."

Mr. *Norton*, for the petition, contended, that the proper mode to discredit a witness, was to swear that he was not to be believed upon oath, without stating the particular fact on which that belief was founded, as such statement would necessarily involve the trial of each particular criminal charge.

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Mr. *Montagu, contra,* did not resist this part of the application; but submitted that the costs occasioned by the application to expunge the affidavit, which was not impertinent, ought to be set off against the costs of this affidavit, which contained scandal and impertinence; and which the Vice-Chancellor was pleased to declare was his opinion.

The order was, that that part of the affidavit which contained scandal should be expunged without any order as to costs.

Ex parte GANE. — In the matter of KEEL.

V. C. LINC. INN. *June* 26, 1826.

What is the bankrupt's commission.

THIS was a petition to supersede a commission, alleged to have been fraudulently issued by *Bisdee* the petitioning creditor, in collusion with the bankrupt and *Hinton* the solicitor.

The petition stated, that on the 10th of December 1825 the petitioner, who was a creditor of *Keel,* received a letter from *Hinton,* in the words following: " Dear Sir, — In consequence of the present stagnation in the money market, my client, Mr. *Thomas Keel,* is reduced to the unpleasant necessity of suspending his payments; and a meeting of his creditors will be held at my office, on Wednesday morning next the 14th instant, at ten o'clock precisely, when a statement of his affairs will be exhibited; and by which I apprehend the creditors will be satisfied, that, providing a short time be given him, his effects will pay twenty shillings in the pound, and

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leave a surplus; but if any hostile proceedings are adopted, a commission of bankruptcy will be inevitable. I am, &c. *J. P. Hinton.*" The petitioner accordingly attended the meeting at the office of *Hinton*, who produced a statement of *Keel*'s affairs, by which it appeared that *Keel* was indebted to the amount of 742*l.* 11*s.* 6*d.*, including the debt of the petitioner for 464*l.* 19*s.* 9*d.*, and that his assets amounted to 768*l.* 6*s.* 10*d.*

That *Hinton* then proposed, that the creditors should give time for payment, and take *Keel*'s notes payable at three and six months, and that the petitioner should take back, at the invoice price, 100 casks of butter, sold by him to *Keel*, which were accordingly delivered to the petitioner, together with a bill, payable on the 21st of February 1826, for the balance of his debt. That on the 14th of February the petitioner met *Hinton*, who said, "Mr. *Gane*, we are going to strike a docket against *Keel*, to make you bring back the butters you had of him." That on the following day *Hinton* called on the petitioner, on behalf of *Keel*, and offered the petitioner a composition of ten shillings in the pound, secured by *James Bisdee*, which offer the petitioner rejected. Within five hours the petitioner received a letter from *Keel*, in the following words: "Feb. 15, 1826. Sir,—Your exposing the bill I gave you has brought all my London creditors upon me; and the manner in which you treated me, after there was nothing more to be got by me (as you thought), has determined me to let Mr. *Bisdee* come in for his 200*l.* he so generously lent me, and he would have given it up to my other creditors, if they would have remained till the time given for the instalments. I must tell you I scorn a roguish transaction, (as you have said you will take

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care there shall not be one). To be plain and honest, I must see that those butters are brought back for the benefit of all. The claims on my effects you little know of, and were never meant to know, if you had acted fairly. Perhaps on the winding up, there may be a shilling in the pound. You must bear in mind you have forced many sales upon me, that were much against my inclination. I can shew true accounts of having lost upwards of 70*l.*, by three lots you pushed upon me. It's a pity but you knew your own interest better, and accept an honest man's offer. Can have but all, but now all shall have a part, if its only enough to bear their expences. P. S.—It appears the day I desired Mr. *Hinton* to call a meeting of my creditors, I committed an act of bankruptcy by leaving town and going over to King's Weston to avoid an arrest." On the 21st of February, on which day the bill given to the petitioner became due and was dishonoured, a commission was opened against *Keel*, in the issuing of which *Hinton* was the solicitor to the petitioning creditor *Bisdee*. That *Hinton* had never before been the solicitor of *Bisdee*, but had always acted as the solicitor of the bankrupt *Keel*. That on the 27th of February the petitioner called upon *Bisdee* to remonstrate with him for having lent himself to such a commission, and that he asked *Bisdee* whether *Hinton* the attorney had been at his house, when *Bisdee* answered, "No, but Mr. *Hinton* sent for me twice to come to Bristol; which I did, and saw *Hinton* each time on *Keel's* business. *Keel* was present with us each time." That the petitioner had then asked *Bisdee* whether *Hinton* had not advised him to issue such commission; to which he answered, "perhaps it may not be proper for me to say, but I think it very improper for the creditors not to have taken the composition for their debts; for Mr. *Hinton* told me he offered you ten shillings in the

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pound, which you refused to take; and *Hinton* told me in *Keel*'s presence, that it would not cost more than 100*l.* to work the commission, and *Keel* said to *Hinton*, it will not cost near so much." That *Bisdee* then admitted that he did not know of any act of bankruptcy having been committed, but he had been told that such act had been committed.

The affidavit of *Hinton* stated, that after the meeting of *Keel*'s creditors on the 14th of December, viz. on the 13th of February 1826, *Keel* had called upon the deponent and stated that in consequence of stagnation in trade, and numerous failures, he had made many bad debts, and found it impossible to carry on his business; that the notes given to *Gane* were becoming due, and he could not take them up; that he had again looked carefully into his affairs, and found that the utmost he could pay would be 10*s.* in the pound; that *Bisdee* wished to avoid a bankruptcy, and had authorised him, *Keel*, to offer his the said *Bisdee*'s security for 10*s.* in the pound in three months. That deponent on the same day saw *Gane*, and mentioned to him that he was about to make the creditors of *Keel* the offer of a composition. That *Gane* replied, that he never would take a farthing less than 20*s.* in the pound; whereupon the deponent stated that he thought a commission of bankruptcy would be issued, and that *Gane* might be called upon to account for the butter which he had taken from *Keel*. That deponent did not send for *Bisdee*, but a few days after, having offered *Gane* the composition, the deponent was apprised that *Bisdee* was in Bristol, and then at the house of *Keel*, and wished to see the deponent, who went, and was desired by *Bisdee* to prepare some security for the debt due from *Keel*; but which the deponent declined doing, having heard that *Keel* had committed an

act of bankruptcy, and deponent explained to *Bisdee* that any such security would be void. That deponent then, in the presence of and with the assistance of *Keel*, and the information obtained from a cursory inspection of his books and papers, ascertained that *Keel* was insolvent; and deponent advised *Bisdee* to issue a commission of bankruptcy against *Keel*, as the only means of obtaining a fair division of his effects, particularly as *Gane* had threatened proceedings on the following Tuesday; and in order to prevent an undue preference of any creditor, *Bisdee* had directed the deponent to issue a commission.

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The affidavit of *Bisdee*, the petitioning creditor, stated that in December 1825 *Keel* the bankrupt communicated to the deponent that he was in embarrassed circumstances, and could not pay his creditors; that as the sum of 201*l.* (which was owing to the deponent from *Keel*) was not an object of great magnitude to the deponent, he had offered to *Keel* that, provided his other creditors would give him time for payment, deponent would consent to their taking a preference, but that deponent wished a bankruptcy to be avoided if possible. That in the month of February 1826 *Keel* again applied to deponent, and stated that in consequence of the pressure which was felt by those engaged in trade, he was unable to carry on his business, and meet his payments. That deponent permitted *Keel* to offer his (deponent's) security to his creditors for 10*s.* in the pound on their debts. That the deponent was shortly afterwards in Bristol, and called at *Keel's* house, and immediately sent for *Hinton*, who thereupon came and informed deponent that he had offered *Gane* the petitioner 10*s.* in the pound, but that he had declared that he would not take a farthing less than his whole demand, and that he

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(*Hinton*) had not received any answer from the other creditors. That deponent having investigated the affairs of *Keel*, wished *Hinton* to prepare some written instrument or document for the purpose of securing deponent's debt; but that *Hinton* explained to the deponent that as *Keel* had committed an act of bankruptcy, any security which he could prepare would be void, and that thereupon deponent had resolved to issue a commission against *Keel*.

Mr. *Montagu* for the petition.

It is impossible not to see that this is a commission, issued by the contrivance of the bankrupt and his attorney, to defeat the petitioner, for his refusal to comply with their unjust terms; and he cited *ex parte Staff* (*a*) and *ex parte Gouthwaite* (*b*), which last case was much stronger than the present, inasmuch as there the petitioning creditor was not brought into contact with the bankrupt, yet it was held to be the bankrupt's commission.

Mr. *Shadwell* and Mr. *Rose* for the respondents.

This commission is not fraudulent, but is consistent with the object of the bankrupt laws — the equal distribution of the bankrupt's property among all the creditors. The only objection to the commission arises from the creditor, who, having obtained an unfair advantage over the rest, is now obliged to refund. It is settled law, that to overreach an execution is a legitimate object of a commission; and the reason extends to a preference which would have the same effect. There is no evidence

(*a*) *Buck*, 431. (*b*) 1 *Rose*, 87.

to connect the petitioning creditor with the bankrupt, so as to make it a concerted commission; and to constitute it the bankrupt's commission, it must be shewn that the process originated in him, with a view to get clear of his debts, and secure the election of his own assignees. (*a*)

The VICE-CHANCELLOR.

Notwithstanding the difficulty of discovering the truth amidst conflicting affidavits, more especially when the Court has to ascertain, through their means, not only the facts, but the motives by which the parties are influenced, I am satisfied that this was not the bankrupt's commission, or used for the bankrupt's purposes. It is impossible to see any object of the bankrupt which this commission was calculated to answer. My opinion, in fact, is, that it was *Hinton's* commission; he acting, in taking it out, from a laudable motive as regards the creditors, by ensuring an equal distribution of the property amongst them.

The case appears to me to be shortly this: — on the 10th of December *Hinton* is instructed by the bankrupt to convene a meeting of creditors, to be held at his house, for the purpose of consulting about his affairs, and of recommending their assent to the proposition which *Hinton* was authorized by the bankrupt to make. The meeting was held on the 14th of December, and the proposition then made was, that the bankrupt should give promissory notes, payable by different instalments, for the whole amount of his debts to all his creditors, except the petitioner *Gane*; and that as to him (*Gane*) he should consent to take back certain casks of butter at

(*a*) See the judgment of Sir *J. Leach*, V. C., *ex parte Staff*, *Buck*, 252.

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the invoice prices, and receive from the bankrupt his security for the remainder of the debt, after deducting the amount of the 100 casks of butter returned. This agreement was assented to by all the creditors: and without doubt the agreement was entered into *bonâ fide* by the bankrupt, with the expectation that if he had the time which he requested, he should be able to overcome his embarrassments and pay the bills. It is notorious, however, that the commercial difficulties in this country, about the month of December 1825, increased instead of diminished; and before the time arrived at which the instalments became due, the bankrupt felt that it would be impossible for him to maintain his ground, and meet his payments as he had agreed. I have no doubt that it occurred to *Hinton* that *Keel* had committed an act of bankruptcy, by absenting himself from his house on the 10th of December, when he (*Hinton*) was first instructed to convene a meeting of creditors; and feeling that a commission was inevitable, thought it due to the creditors in general that such a commission should issue, so as to insure an equal distribution of the bankrupt's property among all the creditors who were creditors at the time the act of bankruptcy was committed; and that consequently justice required that those 100 casks of butter, which had been returned to *Gane* at the invoice prices, should be recalled, and the value of them distributed among all the creditors, so that the petitioner, instead of being paid 20*s.* in the pound, leaving about 1*s.* in the pound for the other creditors, should share equally with them. I have no doubt that such was the motive of *Hinton;* and if so, it was neither an improper nor an unworthy motive. That he first apprised the bankrupt of his bankruptcy seems clear, and that the bankrupt was, in fact, an instrument in his hands. It is equally clear that *Bisdee*, the petitioning creditor, was also an

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instrument in the hands of *Hinton*. But this does not invalidate the commission, which was issued by *Bisdee*, on the recommendation of *Hinton*, for the purpose of effecting that which was advisable and just among all who were creditors on the 10th of December. I am of opinion, therefore, that the commission cannot be superseded, but that the petition must be dismissed with costs.

V. C. LINC. INN. *March* 30, 1827.

Ex parte CUSSE. — In the matter of BOOR.

The certificate ought not to be signed by creditors before the bankrupt has passed his last examination.

PETITION for liberty to prove, and in the meantime to stay the bankrupt's certificate for having been fraudulently obtained.

It appeared that some of the creditors had signed the certificate before the bankrupt had passed his last examination.

Mr. *Russell*, for the petition, referred to the order of the 8th of August 1809, and contended that the certificate was informal and void. The certificate itself states, that the bankrupt had passed his last examination, and made a full discovery and disclosure of his estate and effects; but being upon the face of it signed by many persons before the date of such last examination, there is sufficient evidence of fraud.

Mr. *Glyn*, for the bankrupt, contended that it was not in strictness necessary that the creditors should wait till the last examination: it was the commissioners only who are to certify that he has duly surrendered and passed his examination, and that the certificate has

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been signed by creditors to the requisite number and value. The signature of the creditors is only necessary to enable the commissioners to certify that they (the creditors) are satisfied that the bankrupt has duly conformed, and made a full discovery and disclosure. They may in most cases be fully satisfied of this before the actual formal part of the last examination is passed.

The VICE-CHANCELLOR. (*a*)

The practice of allowing creditors to sign the certificate before the last examination ought not to be sanctioned. I think it proper to make a declaration that no certificate so signed shall be considered valid. The other parts of the petition cannot be supported, but must be dismissed without costs, and the certificate sent back to the commissioners to rectify. (*b*)

It was ordered accordingly.

(*a*) Sir *John Leach.*

(*b*) See the usual advertisement for the third meeting. See also the case, *ex parte Gardner*, 1 *Ves. & B.* 46: In which it was said, in argument, that the hour of the day ought to appear.

Ex parte NEWMAN. — In the matter of JONES.

V. C. LINC. INN. *March* 30, 1827.

A loss by gaming invalidates a certificate, although the bankrupt on the same day wins more than the sum lost.

The Chancellor will, without an issue, decide the fact of gaming when it is not disputed.

PETITION by creditors who had not proved to stay the certificate, upon the ground that the bankrupt had, on a certain day before the bankruptcy, lost 40*l.* by a wager at a main of cocks.

The bankrupt did not deny the fact of such loss; but stated in his affidavit that after having made the above wager, he had made a bet of 45*l.* with another person upon the cocks on the opposite side, the consequence of which was, that upon the result of the main, he was a winner to the amount of 5*l.*

Mr. *Richards*, for the petition, referred to 6 Geo. 4. c. 16. s. 130. (*a*)

Mr. *Rose, contra*, contended, first, that this was not the loss of 20*l.* within the meaning of the act, since, having bet on both sides, he was a winner and not a loser, and was entitled to set off the one bet against the other; secondly, that this application could not be entertained from parties who, not having come in under the commission, had their remedy at law. *Ex parte Dodson.* (*b*) The Court will not stay the certificate upon the petition of creditors who have the means of trying its validity before a jury. Nor is this rule confined to cases of disputed facts; for in *ex parte Henderson* (*c*) the

(*a*) "That no bankrupt shall be entitled to his certificate, &c.; and that any such certificate, if obtained, shall be void if such bankrupt shall have lost, by any sort of gaming or wagering, in one day, twenty pounds," &c.

(*b*) *Buck*, 227.

(*c*) *Buck*, 557.

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fact of the loss was clear upon the bankrupt's own examination. The Lord Chancellor, notwithstanding such admission, directed an issue to try the fact, though at the same time his lordship directed the bankrupt's examination to be produced at the trial, accompanied with a declaration that it amounted to proof of gaming, unless answered by other evidence.

The VICE-CHANCELLOR. (*a*)

I am of opinion that this is a gambling within the meaning of the act. I am of opinion, too, that where the bankrupt has admitted the fact charged, it is too much to send the creditor to law to prove that which has been already admitted. This can only be the rule when the fact of the gambling is disputed.

Certificate stayed.

L. C. LINC. INN. *August* 13, 1827.

After a commission has issued, the statute of limitations does not affect debts not previously barred.

Ex parte ROSS. — In the matter of COLES.

THIS was an appeal from the judgment of Sir *John Leach*, Vice-Chancellor, by which His Honour decided that after a commission issued, the statute of limitations does not run against a creditor of the bankrupt. The case is reported, *ante*, page 46.

Mr. *Shadwell* and Mr. *Montagu*, for the petition of appeal, contended, that the debt, not being recoverable at

(*a*) Sir *John Leach*.

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law or in equity, was not provable under a commission. It would have been barred had the commission been superseded after the expiration of the six years, and before the tender of the proof; and there is no reason why it should be kept alive by the existence of the bankruptcy, which is a statute execution for the quick distribution of the property among the creditors, and which is only meant to operate in favour of those who take advantage of it within reasonable time, otherwise great mischief may arise by creditors lying by till the property is distributed, and then harass the assignees. It would preclude the possibility of a final dividend. The commission cannot be properly compared to commencing an action or entering a continuance, since those are the acts of the creditor, who thereby keeps his claim alive.

Mr. *Rose* in support of the Vice-Chancellor's judgment.

The commission is a process for the benefit of all the creditors, and the assignees are trustees; they have delegated duties — they are always recognized as such, and in all suits they have costs as trustees. There is a perfect analogy between creditors proving under a commission, which is a process for the benefit of creditors, and going in under a decree for payment of debts in a suit against executors. If the debt were a valid subsisting debt at the time of filing the bill, it is not affected by the subsequent lapse of six years, though the creditor be no party to the suit. In like manner a legal debt, subsisting at the date of the commission, is provable, though the time which would have barred it, had no trust existed, have expired; and he cited *ex parte Peachey*, 1 *Atk.* 111; *Fergus* v. *Gower*, *Sch.* & *Lefr.*; *Burke* v. *Jones*, *Ves.* & *B.* 275.

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Whatever may be the technical objection, the effect of the commission clearly is to vest the property in the assignees for the benefit of the creditors; they are, therefore, in fact, trustees: and it is an admitted rule, that unless debts are already barred by the statute of limitations when the trust is created, they are not afterwards affected by lapse of time. With respect to the possibility of inconvenience, from creditors negligently waiting until the funds are distributed, they are exactly in the same situation as creditors are who come in after the funds have been all applied under a decree, when the trustees may plead *plene administravit;* they must take the consequences of their own neglect, and the Court would protect the assignees. I think the decision of the Vice-Chancellor was right.

Order affirmed.

L. C. WESTM. HALL. *June* 23, 1827.

Ex parte LEIGH and others. — In the matter of CLAUGHTON.

Where the bankrupt acquiesces, the Chancellor will, upon petition, restrain him from proceeding at law.

THIS was a petition by the assignees, to restrain the bankrupt from proceeding at law to impeach the validity of the commission; and that he might be ordered to execute conveyances.

The petition and affidavits in support, stated, that the commission had issued in March 1824; shortly after which a petition was presented to supersede for concert and want of trading, upon which petition the bankrupt

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made an affidavit in support of the commission. That the bankrupt had been actively engaged by himself and counsel, who attended from London to oppose proofs, particularly the proof of *Thomas Leigh*, and had solicited votes in order to control the choice of assignees. That the bankrupt procured a petition to be prepared by the person who acted as his solicitor, which was signed by several creditors connected with the bankrupt, and who signed the petition at his request, which petition stated, "That a commission had duly issued against the said *Claughton*, under which he had been duly declared bankrupt;" and it prayed, among other things, that the proof of *Thomas Leigh* might be expunged; and that the assignees might be removed. That the bankrupt had expressed a desire to have the sales of his estates delayed; and a sale of some of them being contemplated, he had, in the latter part of the year 1824, addressed a letter to that effect to the solicitors of the assignees. That the bankrupt had proposed to the assignees, that inasmuch as there were many mortgages and incumbrances affecting his real estates, it would be expedient, previous to a sale, to raise a large sum upon mortgage, with a view to get the incumbrances into one hand, and to pay a present dividend to the creditors; and he took an active part in negociating such advance upon the estates. That Mr. *Kaye*, a solicitor, whose client proposed to advance money for the above purpose, being apprised of the petition above-mentioned, wrote to the bankrupt as follows: "After the communications that have passed between us, I am much surprised to learn that this day affidavits have been filed in support of the petition presented at your instance, and that it will be in the paper for hearing to-morrow, and must be disposed of, unless the respondents oppose on the merits at once, or apply for delay. The latter course will not be adopted;

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and it is in vain that you urge that you have no control over the petition, as the circumstances, under which it has been got up, afford too strong evidence to the contrary." That the bankrupt, immediately upon receiving the above communication, undertook to dismiss the petition; and it was accordingly, by his instructions, dismissed with costs.

That the negociations as to taking up money by mortgage were continued, and in May 1825 the bankrupt, in pursuance of the plan suggested by Mr. *Kaye*, caused another petition to be presented in the bankruptcy, by a solicitor employed by the bankrupt, and was signed by certain creditors, who were his relations and connections; and it prayed a reference to the commissioners, whether it would be for the benefit of the estate for a loan of 150,000*l.* to be raised on the security of the said estates, and for the incumbrances thereon to be satisfied, and in the meantime to stay the sales.

That the bankrupt attended in person at the hearing of the petition, on the 29th June 1825, when it was ordered, on the application of the bankrupt, that it should be referred to the commissioners to enquire, whether it would be advisable to procure any money, &c. That the bankrupt assisted in settling the minutes of such order. That the commissioners held many meetings, which were attended by the bankrupt's counsel and solicitor, to conduct the case in favour of the bankrupt's proposals for raising a loan on his estates. That the debt of *Thomas Leigh* was submitted to arbitration; and the bankrupt, with his counsel and solicitor, attended the meetings, and took an active part therein. That the commissioners made their report, by which they certified

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that it was not desirable to procure any advance by way of loan on the bankrupt's estate. That the petitioners presented a petition to confirm the report, and that the sales might be completed; but they were informed by the bankrupt, that it was his intention to file a petition, by way of exceptions, to such report, but that he was willing not to file the same, provided the assignees would defer their petition, and give further time to see whether a specific offer of a loan would be made, or purchaser of the whole estate found, the bankrupt being, as was alleged, in treaty with some person for the purchase of the whole. That an agreement was, on the 15th of April, entered into between the petitioner's solicitor and the solicitor of the bankrupt, which was approved of by the bankrupt, by which it was arranged that if, before a certain day, an offer to advance 150,000*l.* upon the bankrupt's estates were not made, then he would consent to the petition to confirm the commissioners report, and to dismiss the original petition; and that no proposal to advance such sum, or to purchase the whole estate, having been made within the time limited, the order dismissing the former petition and confirming the report, was accordingly made on the 24th May 1826, and the bankrupt's application that his costs of the proceedings before the commissioners might be allowed out of the estate was refused. That the petitioners thereupon proceeded to sell the estates, and a considerable portion was advertised for sale by auction on the 10th and 11th days of July 1826, when the bankrupt again applied for a further postponement; and that the bankrupt had obtained many signatures to his certificate, notwithstanding which he had, in August 1816, commenced an action against the petitioners, for the purpose of trying the validity of the commission.

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Mr. *Mitford*, for the bankrupt, contended, that the Court had not jurisdiction upon petition; and he cited *Flower* v. *Herbert*, 2 *Ves.* 326. (*a*)

Mr. *Sugden* and Mr. *Montagu*, in support of the jurisdiction, cited *ex parte Grant*, *Buck*, 90, *Kirkpatrick* v. *Dennett*, 1 *Gl. & J.* 300; and *ex parte Cutten*, 1 *Gl. & J.* 317. That this was a case proper for the exercise of such jurisdiction is abundantly proved by the cases, *Flower* v. *Herbert* (*b*); *ex parte Abel* (*c*); *ex parte Warrand* (*d*); *Thorpe* v. *Goodall* (*e*); *ex parte Bryant* (*f*); and *ex parte Cutten* (*g*): for although at law the bankrupt would be estopped, *Like* v. *Howe* (*h*); *Clark* v. *Clark* (*i*); *Goldie* v. *Gunstone* (*k*); *Watson* v. *Wace* (*l*); yet this Court will restrain him from keeping an action pending, in which he cannot succeed, which must operate to the injury of the creditors, and be attended with delay to all parties, and expence to the estate.

The LORD CHANCELLOR.

A small portion of the acts of submission and co-operation which are presented to the Court, independent of the lapse of time, would induce me to restrain the bankrupt from contesting a commission, the validity or invalidity of which must so long have been a fact within his own knowledge. In the present case I should hardly

(*a*) See also *ex parte Glossop*, in the matter of *Kemp*, *ante*, page 268.
(*b*) 2 *Ves.* 526.
(*c*) 1 *Gl. & J.* 199.
(*d*) 4 *Mad.* 262.
(*e*) 17 *Ves.* 393.
(*f*) 1 *Ves. & Bea.* 506.
(*g*) 1 *Gl. & J.* 317.
(*h*) 6 *Espinasse*, 20.
(*i*) 6 *Esp.* 61.
(*k*) 4 *Camp.* 381.
(*l*) 5 *Barn. & Cr.* 155.

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think it necessary to interfere, where I conceive he would find himself estopped at law, but for the delay which may in the meantime occur before a trial, and to which, under my present conviction that the bankrupt ought not to be permitted to proceed with a vexatious action, I am unwilling to subject his assignees.

By the order, the bankrupt was restrained from proceeding in the action commenced by him, and also from commencing or prosecuting any other proceedings, at law or in equity, to impeach the validity of the commission.

Ex parte PEAKER. — In the matter of PEAKER.

L. C. LINC. INN. *July* 21, *Dec.* 15, 1827.

The commission cannot, after the 42d day, be superseded upon the petition of the bankrupt before his surrender, although all the creditors consent.

A PETITION was presented by the bankrupt to supersede, with the consent of creditors, upon the usual certificate of the commissioners; but their certificate did not state that the bankrupt had duly surrendered.

Mr. *Montagu* stated, that the question was, whether, when all the creditors consented that the commission should be superseded, there was any necessity for the bankrupt to surrender, after the expiration of the statutable time for the surrender.

In determining this question, it was necessary to consider; 1st, the object of the Lord Chancellor's order for the bankrupt to surrender; 2dly, the power of the Lord Chancellor to supersede, when a felony has *primâ facie* been committed. First, as to the Chancellor's order: the order cannot operate as the pardon of an offence committed; this right vests only in the crown. It is merely a mode of declaring the opinion of the

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Court, that the non-surrender was not from any fraudulent intent, and that the commissioners may proceed in the examination, notwithstanding the apparent violation of the law by the non-surrender. *Ex parte Johnson*, 14 *Ves.* 36. The only intelligible object is, that the commissioners may proceed with the examination: but when all the creditors consent to a *supersedeas*, what necessity is there that the bankrupt should surrender, when no examination can take place?

2dly, As to the power of the Chancellor to supersede, when a felony has *primâ facie* been committed, no doubt can be entertained. In *ex parte Wood* (*a*), the Lord Chancellor says, "Lord *Macclesfield* did, in more instances than one, supersede a commission of bankruptcy, where the bankrupt had not surrendered himself within the forty-two days, if there did not appear to be any intention in the bankrupt of defrauding his creditors, by not appearing within the time appointed." *Ex parte Lavender*, 1811, 1 *Rose*, 55, was a petition to supersede a separate commission, under which the bankrupt was committed for trial for not having surrendered. The ground of the application was, that a subsequent joint commission had issued, and that the omission to surrender was not from any fraudulent intent, but from mistake. In support of the application *ex parte Wood* (*a*) was cited, and the commission was superseded upon that authority. *Ex parte Roberts*, 1816, 2 *Rose*, 378, was also a petition to supersede a separate commission, under which the bankrupt had not surrendered, in order to give efficacy to a joint commission. The Lord Chancellor was of opinion, that he ought not to supersede a commission, under which the bankrupt, no

(*a*) 1 *Atkyns*, 222.

circumstances of extenuation appearing, was exposed to a prosecution for not surrendering.

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The cases then, assuming this to be the object of the Chancellor's order and the nature of his jurisdiction, are of two classes: — 1st, Where the bankrupt petitions, adversely to his creditors, that the commission may be superseded; and 2dly, where he petitions with the consent of his creditors.

When the bankrupt petitions adversely, before the expiration of the time for surrender, he may be heard without having surrendered. This was lately agitated in *ex parte Nicholls* (*a*), where the Vice-Chancellor observed, that the bankrupt was not bound to surrender till the last public meeting, and he superseded the commission at the costs of the petitioning creditor. It appears extraordinary that such a question should ever have been agitated; except that there seems always to be a disposition to extend decisions, from some apparent resemblance to cases where, although the resemblances are apparent, the differences are real.

When the bankrupt petitions adversely, and the petition is not heard until after the expiration of the time for surrendering, it has been decided that he cannot be heard until he shall have surrendered; though the principle of these decisions seems extremely doubtful. After a careful examination of the authorities, it is difficult to discover when it was first so determined. The first case where it is assumed is *ex parte Jones* (*b*), which was a petition by the bankrupt, praying that the commission might be superseded and the bond as-

(*a*) 2 *Gl. & Jam.* 101. (*b*) 1805. 11 *Ves.* 409.

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signed: the counsel for the assignees referred to *ex parte Jones*, 8 *Ves.* 328. The Lord Chancellor said, "it has been determined frequently that the bankrupt must surrender; and after much discussion in the late case, *ex parte Stokes* (*a*). Upon the reason also it is proper; for if the bankrupt is not to surrender until he has sifted to the bottom here the trading, the act of bankruptcy, and the petitioning creditor's debt, when these particulars afterwards come to be proved before the commissioners, many persons against whom commissions of bankruptcy issue will disprove every thing." It was clearly a mistake to suppose that *ex parte Stokes* applied; for that was a petition to supersede before the bankruptcy was found: and why should *not* a person against whom a commission issues have every facility to sift to the bottom the trading, the act of bankruptcy, and the petitioning creditor's debt?

The next case is *ex parte Roberts* (*b*), which was a petition by the bankrupt to supersede a joint commission for want of a petitioning creditor's debt. It was objected that he had not surrendered; and the objection was, by Sir *Thomas Plumer*, Vice-Chancellor, allowed. The joint creditors then applied to supersede the joint commission, as it had issued upon an insufficient debt; and it was superseded.

If, then, the Lord Chancellor is convinced, before the bankrupt has surrendered, that a commission has not sufficient requisites to support it,—that is, that it ought never to have issued, why is a creditor entitled to a supersedeas, and the person most injured

(*a*) 1803. 7 *Ves.* 405. (*b*) 1816. 2 *Rose*, 378.

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by this illegal process not to be heard until he has submitted to it — until he has submitted to a violation of the law?

The next case is *ex parte Whittington* (*a*), where, after having presented his petition to supersede, the bankrupt died before the last meeting of the commissioners, without having surrendered. The petition was revived by his personal representatives, and the commission ordered to be superseded.

The cases which have arisen upon the consent of creditors are, first, *ex parte Jones* (*b*), which was a petition by the bankrupt to supersede; all the creditors consenting. The Lord Chancellor said, "Notwithstanding I believe it to be an honest case, I cannot do it in this way; he has committed a felony, which cannot be got rid of in this manner. He must apply by another petition first, to have leave to surrender. Then he will be before his creditors, and after that he may make this application." The petition was dismissed; but upon considering this reason it is difficult to discover how the bankrupt's appearance before his creditors could give to the Court a right to get rid of the felony, if it could not get rid of it without such appearance.

The next case is *ex parte Bean* (*c*), where the creditors consented to the supersedeas, but the bankrupt had not passed his examination, and was under commitment by the commissioners. The Lord Chancellor refused to make the order, observing, that it was settled that a bankrupt cannot supersede his commission until he has surrendered.

(*a*) 1818. *Buck*, 236. (*b*) 1803. 8 *Ves.* 528. (*c*) 1809, 17 *Ves.* 47.

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The last case is *ex parte Carling*. (*a*) In this case the commission had issued in 1816, the bankrupt being abroad. In 1824 the bankrupt, being still abroad, and avowing his intention of not returning, offered 15*s*. in the pound to his creditors, upon the commission being superseded. The offer was accepted, and a petition, signed by all the creditors, was prepared; but as the bankrupt had not surrendered, an application was made to the Lord Chancellor that his surrender might be dispensed with. The Lord Chancellor observed, that as a commission of bankruptcy was merely a civil process, he saw no reason for refusing the application, and the commission was superseded accordingly.

In this state of the authorities, Mr. *Montagu* submitted that there was not any reason why the bankrupt should surrender to the commission when no examination was required: and that if the principle of the cases was traced to its source, it might probably be discovered that these decisions had been founded upon the supposed but erroneous analogy between non-surrender under a commission of bankruptcy, and being in contempt.

August 4, 1827.

The LORD CHANCELLOR directed that the commissioners should certify why the bankrupt had not surrendered within the proper time: and they certified that his non-surrender had been occasioned by his being a prisoner in the King's Bench; and the commission being a country commission, executed at Halifax, in Yorkshire: and that although the detaining creditor had proved his debt at the meeting for the choice of assignees, he had neglected to send the bankrupt his discharge, until subsequently to the day appointed in the London Gazette for his last examination.

(*a*) 1825. *Ante*, page 55.

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Mr. *Montagu* submitted, that after such an explanation of the cause of non-surrender, the Court would not now insist upon a form, the reason of which no longer existed, and with which there could not be a compliance without the expence of a petition for liberty to surrender, a journey into Yorkshire, and the costs of a meeting of commissioners, at which no examination could take place.

The LORD CHANCELLOR.

The order made by Lord Eldon, in *ex parte Carling*, was under very special circumstances. The bankrupt was abroad, and did not mean to return, and it was obviously for the benefit of the creditors that the rule should be relaxed. I do not think that the circumstances of the present case warrant me in making an exception to the rule, that a bankrupt must surrender before he can petition to supersede, even with consent of creditors. This rule has been long acted upon; and though there may in many cases appear no imperative reason for enforcing it, yet the departure from a settled rule is too frequently attended with evil, to allow me hastily to deviate from the practice of my predecessors. The question may, for the regulation of such proceedings in future, be deserving of consideration; but I cannot supersede the present commission until the bankrupt shall have surrendered.

L. C. WESTM. HALL, 1827.

Ex parte BURLTON and others.—In the matter of THOMAS COLEMAN and EDWARD WELLINGS, and in the matter of THOMAS COLEMAN, JOHN MORRIS, JOHN BEEBEE MORRIS, and THOMAS MORRIS.

Whether a commission can be superseded as to one of two bankrupts, to give validity to a subsequent commission against the other with a third, quære.

ON the 29th of March 1826 a commission issued against *Coleman* and *Wellings* of Ludlow. *On the* 30*th of* March 1826 *a commission* issued against *Coleman, Morris, John Beebee Morris*, and *Thomas Morris* of Leominster.

This was a petition by the assignees of the Leominster firm, to supersede the commission against the Ludlow firm, as far as related to *Thomas Coleman*.

The petition stated, that the proofs against the joint estate of *Coleman, Morris* and Co. amounted to 91,557*l.* 4*s.* 8*d.*, and against the separate estate of *Coleman*, to 40,676*l.* 17*s.* 10*d.* That the debts proved under the commission against *Coleman* and *Wellings*, particularly against the separate estate of *Coleman*, were, if any, of trifling amount. That the petitioners had sold *Coleman*'s real estates, the titles of which had been approved, and the conveyances in progress; and the only objection was the existence of the commission against *Coleman* and *Wellings*.

It appeared from the affidavits of the respondents, that in August 1814 a suit in chancery was instituted by *Coleman* and *Wellings*, together with the representative of *Davies*, a former partner, to recover a large debt due to the Leominster and Ludlow concern, which were

originally connected, in which suit it would be necessary to take the accounts of the respective partnerships; and that the plaintiffs in that suit had proved debts to the amount of 14,000*l.* and upwards before the master, due to them as surviving partners of the old Leominster and Ludlow joint concern.

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The affidavit of the assignees under the Ludlow firm stated, that they had been duly directed to prosecute such suit. That the petitioners, as assignees of *Coleman, Morris* and Co., had tendered a proof of 13,924*l.* as due from *Coleman* and *Wellings* to the Leominster firm, but which proof the commissioners had not received. That before the presenting of this petition the deponents had commenced actions at law, to recover debts due to the joint estate of *Coleman* and *Wellings*, which actions were now pending. That proofs to the amount of 78,000*l.* had been made against the joint estate of *Coleman* and *Wellings*, and a dividend of 4*s.* in the pound had been paid thereupon. That there were many joint debts yet outstanding, to recover which it would be necessary for the deponents to bring actions as assignees. That no application had been made to the deponents to become parties with the petitioners in any conveyances of *Coleman*'s real estate; but that they were willing to concur in such conveyances, and to do any such act for facilitating the administration of *Coleman*'s separate estate, as might, upon the hearing of the petition, be ordered.

Mr. *Rose* and Mr. *Montagu* for the petition.

There cannot be two legal commissions existing at once against the same person; and the difficulty which the Court would formerly have had to encounter in dealing with a case like the present was removed by the

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16th section of the bankrupt statute which enables the Lord Chancellor to supersede a commission as to one or more persons, without affecting its validity as to the rest. (*a*) Had there been a commission against *Coleman* alone, there would have been no difficulty in superseding it; in principle, the case is not varied by the fact of the commission including *Wellings;* and they cited *ex parte Cridland,* 3 *V. & B.* 102; *ex parte Tobin,* 1 *Ves. & Beames,* 308; *Mont.* Partnership, 102.

Mr. *Heald* and Mr. *Wakefield,* for the assignees of *Coleman* and *Wellings,* denied the authority of the Court to deprive one class of creditors of their legal right to a commission, upon the ground of the convenience of another class.

The VICE-CHANCELLOR. (*b*)

August 16, 1827.

I have very great doubt whether I have power to grant the prayer of this petition, where superseding the commission is a matter of convenience and arrangement only; if, however, precedent can be produced, I should not hesitate to follow that precedent, without regard to the doubts which prevent me, in the first instance, putting a construction upon the act of parliament, which, according to my present impression, it will not bear. A commission has issued against two persons, which commission is not impeached, either in regard to its legal

(*a*) "In every commission against two or more persons, it shall be lawful for the Lord Chancellor to supersede such commission as to one or more of such persons, and the validity of such commission shall not be thereby affected as to any person as to whom such commission is not ordered to be superseded, nor shall any such persons' certificate be thereby affected."

(*b*) Sir *Anthony Hart.*

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validity, or the *bona fides* with which it was issued. Can, then, third parties, not connected with the commission, and not impeaching the commission or the conduct of those who act under it, seek to have it superseded as a matter of convenience. It is said that the superseding of commissions is in the discretion of the great seal, and that a commission is a species of execution, over which the Lord Chancellor (as is done by courts of law) is in the habit of exercising jurisdiction for the purposes of justice. But where there is a legal execution, with no imputation of fraud or irregularity, is there any instance of a Court's depriving the creditor of the benefit of that execution?

This is not the common case of superseding a separate commission, in order to give operation to a more extensive commission, embracing the same parties; and I cannot satisfy myself that I am warranted by the statute in assuming this authority.

With all the attention I can give to the clause, and construing it according to the principles which influence this court in bankruptcy, I do not consider that it authorizes me to supersede the commission as to one, when such exercise of authority must deprive creditors of their right to a commission which they have legally issued. Instead of dismissing the petition, however, which I must do if I decide upon my opinion, the petitioners are at liberty to have it transferred to the paper of the Lord Chancellor.

The petitioners availed themselves of the liberty given by His Honour the Vice-Chancellor, and the case came on to be heard on the 10th of November, before the Lord Chancellor.

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Mr. *Sugden*, *Mr. Rose*, and Mr. *Montagu* for the petition.

The commission which is best adapted to the general benefit of the creditors is that which the Court will support. *Ex parte Crew*, 16 *Ves.* 237; *ex parte Lees*, 16 *Ves.* 472; *ex parte Rawson*, 1 *Ves. & Beames*, 160; *ex parte Munton*, 1 *V. & B.* 60; *ex parte Mason*, 1 *Rose*, 423.

This was the authority of the Court under the old law: but by the statute empowering the Court to supersede a commission as to one, and to leave it in operation as to the other, can it be supposed that it was meant to narrow the discretionary authority already vested in the great seal?

Mr. *Heald* and Mr. *Wakefield* against the petition.

All the Court can now do is, to restrain the assignees under the *Ludlow* commission from interfering with the separate estate of *Coleman*: for if the joint commission against *Coleman* and *Wellings* be superseded, there is no mode of recovering the joint debts of the *Ludlow* firm.

The provision in the statute respecting the power of superseding as to part of a firm does not apply. The object of that provision, which was first a separate act of parliament (3 Geo. 4. c. 74), is explained by the preamble. The words are, that "Whereas where a joint commission has issued against two or more persons, being partners, under which commission one or more, and not all of the bankrupts, may be *entitled to have such commission superseded.*"

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This, therefore, only gives the Court jurisdiction in case the bankrupt being so *entitled* — that is, who shall have been declared bankrupt without the requisites to support a commission, or who shall have paid 20*s.* in the pound, shall apply to have the benefit of that clause. The Court is empowered upon his application to supersede the commission as to him. In this case alone can the jurisdiction be exercised: but how can this apply to the present case, where the bankrupt is in no wise so entitled. It does not authorise the Court to supersede upon the hostile application of creditors under one commission, by depriving the creditors under another commission of their legal rights. Neither does this fall within that class of cases where the Court has exercised its discretion by superseding one commission where the benefit of the creditors required that the machinery should be simplified, and several commissions consolidated, which can only be done where a commission could issue which would embrace *all* the partners. These commissions are not susceptible of consolidation, since no commission could issue which would comprehend *Wellings*. The Court will not supersede a commission against one member of a firm, where, after obtaining his certificate under it, a more extensive commission issues against himself and partners, but will order it to be impounded, that it may not be used to the prejudice of the joint commission. The commission against *Coleman* and *Wellings* may, as regards the commission against *Coleman, Morris* and Co., be in like manner impounded, and the same result be produced in favour of the petitioners as could be effected by a supersedeas. The argument of expediency applies to one side of the question as well as to the other; and there is a sufficient reason against complying with the prayer of this petition in the fact of an adverse claim being preferred by the assignees of the

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Leominster firm against the estate of *Coleman* and *Wellings*, which the commissioners have rejected, but which would undoubtedly be substantiated if the estate of the *Ludlow* firm were deprived of the protection of the assignees. Neither was there the reason which, if true, could alone afford ground for superseding the commission against *Coleman*, since the assignees under the *Ludlow* commission had offered, and were still willing, to join in the conveyances.

Mr. *Sugden* in reply.

Before the passing of 3 Geo. 4. c. 74. the Court had a general jurisdiction to supersede, where expediency required such a measure, and such jurisdiction, in a case like the present, would have been exercised by superseding the commission against *Coleman* and *Wellings*, and left the creditors of the *Ludlow* concern to have issued a separate commission against *Wellings* alone. The only object of the provision in the new act is to enable the Court to do directly what it could have done before by a circuity expensive to the creditors; and the words in the existing statute are not limited by any preamble, as in 3 Geo. 4. c. 74, but empower the Chancellor to supersede generally. It is then a question of expediency, and the Court must be influenced by what shall appear to be the balance of mischief. It is impossible for the assignees under the *Leominster* commission to make a good title to the real property of *Coleman*, since the legal estate is not in them.

The evil has been proposed to be cured by impounding the commission. That might be sufficient with regard to parties claiming under the bankruptcy. The Court would not allow parties suing in the bankruptcy to set up the first commission: but what is to prevent

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the purchasers, who are strangers to it, from refusing to accept a defective title, and from answering the assignees calling for a specific performance, with, "You knowingly taking bad title shall not compel us also to accept the same."

The LORD CHANCELLOR (after stating the facts of the case) added, —

Feb. 11, 1828.

In ordinary cases, where there is a separate commission and a joint commission, if it be for the interest of the creditors, the separate commission will be superseded, in order to give full effect to the joint and more extensive commission. This is a matter of course, if a sufficient case be shewn. There has, however, been no instance of a case like the present; and in answer to the inference drawn from such absence of precedent (*a*), it has been said that, until the passing of a recent statute, no such application could by possibility have been entertained; and it is contended, that by the 16th section of stat. 6 Geo. 4. the Lord Chancellor has authority to make the order which is here prayed. It is, however, unnecessary to decide whether I have such jurisdiction or not; for after reading the affidavits in support of the prayer, and in opposition, I am of opinion that a sufficient case has not been made out to warrant me in the exercise of that power, even presuming it to be quite clear that I possess it.

It is stated in the petition, by the assignees of *Coleman*, *Morris* and others, that the debts which have been proved against the estate of *Coleman* and *Wellings* are, if any, of

(*a*) The Act 3 G. 4. c. 74. (now section 16 of 6 G. 4. c. 16.) passed only in the year 1824.

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trifling amount. In answer, however, to that allegation, it is sworn, that joint debts to the amount of 78,000*l.* have been proved under the commission; that a dividend of 4*s.* in the pound has been actually paid; that there is a suit in chancery now pending, under which debts to the amount of 13,000*l.* or 14,000*l.* have been proved before the master; that actions, at the suit of the assignees under the commission against *Coleman* and *Wellings*, are depending; and that there is a claim made by the assignees of *Coleman, Morris* and Co., against the estate of *Coleman* and *Wellings*, to the amount of 14,000*l.*, which the commissioners under the commission against *Coleman* and *Wellings* have not yet allowed. Under these circumstances it appears to me, even were I disposed to assent to the arguments in favour of the jurisdiction under 6 Geo. 4. c. 16. (and it must be remembered that the Vice-Chancellor considered that the Court had not the power contended for), I conceive that I should not be exercising a sound discretion in granting the prayer of this petition. Great difficulty would, by such a measure, be created under the commission against *Coleman* and *Wellings*, and the affairs of that estate be involved in inextricable confusion.

The only reason which is brought forward in support of the petition is, that contracts have been entered into by the assignees of *Coleman, Morris* and Co., for the sale of the real estates of *Coleman*, and that the purchasers object to the title which they can make. At the time the assignees entered into those contracts they were fully aware of the situation in which *Coleman* stood; if, therefore, they have entangled themselves in that respect, they must take the consequences; but I think that it is a sufficient answer to that argument, that it is stated in the affidavits that no application has been made by the assignees under the commission against *Coleman, Morris*

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and Co., to the assignees under the commission against *Coleman* and *Wellings*, to join in the contracts; and that such last-mentioned assignees state in their affidavits, that they are willing to do what is required of them, and what is proper to be done. The ground of this application, therefore, fails entirely; and without reference to the soundness of the Vice-Chancellor's objection to the jurisdiction, I am of opinion, that this petition cannot be sustained.

Petition dismissed with costs, to be paid out of the joint estate of *Coleman*, *Morris* and Co.

Ex parte RAWSON and others. — In the matter of DUNCAN.

V. C. LINC. INN. *Feb.* 27, 1828.

The deposition of the petitioning creditor at the opening of the commission not a proof to entitle him to vote for assignees.

THE petitioners and others, creditors to the amount of 574*l.* 14*s.* 1*d.*, applied for the removal of the assignees, and for a new choice, as they had been elected by a creditor named *Jones*, whose debt was 123*l.* 16*s.* 6*d.* only, and by *Snead* the petitioning creditor, whose debt amounted to 500*l.*, but which had not been proved at a public meeting, but only by his deposition at the opening of the commission.

Mr. *Montagu* for the petitioners.

By section 61 of the 6 Geo. 4. c. 16. the election of assignees must be by creditors, who have proved debts to the amount of 10*l.* and upwards. The questions, there-

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fore, in this case are two: 1st, whether the persons elected assignees can include the petitioning creditor, so as to claim a majority; and 2dly, if they cannot, whether they are entitled to retain their appointment by virtue of the vote of the one creditor, to the amount of 123*l.* 16*s.* 6*d.*

As to the first, it is clear that the deposition of the petitioning creditor, at the opening of the commission, is not a proof; it is taken *ex parte*, without the possibility of any objection being made, either by the bankrupt or by any of the creditors; and although it is deemed sufficient to warrant the commissioners in proceeding to the declaration of bankruptcy, it does not confer any right either to vote for assignees, to interfere with the certificate, or to a share of the dividend.

In practice, it never was before attempted to consider such a deposition as a proof of debt; and the principle is as clear as the practice; for if a deposition at the opening of a commission, taken *ex parte* and without the possibility of objection, is to be deemed a proof, a creditor or no creditor may swear to any sum which will controul the choice of assignees, the certificate, and absorb the dividend; and he referred to *List's* case, 2 *Ves. & B.* 374, in which the Lord Chancellor says, that the petitioning creditor must not only prove his debt privately at the opening of the commission, but must also make a second proof at a public meeting.

With respect to the second question, whether the assignees are to continue, because elected by a creditor whose debts amounted to 126*l.* only, he contended that the election was void, not only because 126*l.* was a sum too small to controul the choice made by eight or ten

creditors, whose debts amounted to 574*l.* but because the choice was substantially made by a person who had no right to vote; and he referred to *ex parte Ackroyd*, 1 *Gl. & Jam.* 394; *ex parte Scholey*, 1 *Gl. & Jam.* 2; *ex parte Durant*, *Buck*, 20; *ex parte Edwards*, *Buck*, 411; *ex parte Hawkins*, *Buck*, 520; and to *ex parte Parr*, 18 *Ves.* 70.

Mr. *Rose*, against the petition, said, that the present choice ought to be supported, for two reasons: 1st, That there was no decision, or statutory enactment, declaring that the petitioning creditor was bound to prove twice. The proof of the petitioning creditor's debt at the adjudication was made with the same solemnity as other proofs, and there was no reason why it should not be accompanied by the same privileges.

2dly, Supposing *Snead* could not vote in respect of his debt so proved, still, as the choice had been sanctioned by the commissioners, and there was no imputation of fraud, the Court would support the choice, upon the principle of the cases cited by Mr. *Montagu*. The proof of *Jones* was not impeached; and it had repeatedly been decided that a choice will not be set aside for the erroneous *rejection* of a debt, nor will it be done where the ground of objection is the erroneous *admission* of a debt. *Ex parte Parr*. (*a*)

It was unreasonable to compare this case with *ex parte Edwards*, where the disproportion between the amount by which the assignee was chosen and the proof improperly rejected was so great; yet even there

(*a*) 18 *Ves.* 70.

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the order for a new choice was only made upon the petitioner indemnifying the estate against all costs.

But supposing the choice to have been erroneously made, still, as there is no imputation of unfitness in the parties, the Court will support the choice, which has been confirmed by the due execution of the assignment by the commissioners; since, if the assignment be perfect, it can never be objected at law that the assignees were not duly chosen: neither is it a matter of importance whether the person elected have proved or not, since it is not necessary that the assignee should be a creditor, and it is competent to the commissioners to assign to a stranger.

Mr. *Montagu* in reply.

The commissioners have no power (except in the case of a *provisional* assignment) to assign to any persons but such as are chosen in the manner prescribed by the statute; viz. by "creditors who have proved debts under the commission." Nor will the subsequent regular execution of the assignment by the commission cure the defect in the choice; *ex parte Moore*, 1 *G.* & *J.* 190, where the argument, that the assignment if duly executed could not be impeached at law, was used in support of a choice, defective because made before one commissioner only. The Vice-Chancellor, Sir *John Leach*, set aside the choice, observing, "that the question was not, whether the assignment would or would not confer a legal title upon the person there named as assignee, but whether that person ought to be invested with such legal title; and not having been duly chosen, he could not be permitted to sustain that character."

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The question here is not whether the Court will disturb a choice of assignees, which it will not do upon slight grounds, but whether that is to be considered as a *choice of assignees*, which is not made in the mode prescribed by the statute. I am of opinion, that this is not a statutory choice, but that the words of the act must be literally complied with, and the choice made by the "creditors who have proved debts under the commission." Every creditor has an interest in seeing that the trustees, who are to deal with his property, have an indisputable title. In the cases where the Court has refused to set aside a choice of assignees upon the question of amount merely, the persons chosen were chosen by creditors who had proved, and the elections were therefore made in a statutory manner. I cannot admit that to have been the fact here, where the choice was effected by a creditor who had not proved.

The choice was ordered to be set aside. Costs of all parties to be paid out of the estate.

V. C. LINC. INN. *March* 5, 1828.

Ex parte PAVEY. — In the matter of PAVEY.

The bankrupt has no right to his allowance until the certificate has been confirmed by the Chancellor.

Whether the allowance is payable where the net produce is only 10*s.* in the pound, quære.

THIS was a petition by a bankrupt for his allowance.

The petition stated, that on the 21st of November his certificate was signed by the commissioners, and was advertised on the 24th of November. The 8th of December was appointed for a final dividend. That the petitioner attended on the 8th, when he was informed by the clerk to the solicitor, that the dividend would amount only to 9*s.* 9*d.* in the pound, but that upon computation the dividend was declared to be 10*s.* 3*d.* in the pound, and the order was immediately signed by one of the commissioners, who thereupon quitted the Court before the petitioner had an opportunity to apply to the commissioners.

Mr. *Montagu* for the petitioner.

By section 128 of 6 Geo. 4. c. 16. it is enacted, "That every bankrupt who shall have obtained his certificate, if the net produce of his estate shall pay the creditors who have proved under the commission ten shillings in the pound, shall be allowed five per cent. out of such produce."

As a matter of right the question is whether a bankrupt, whose certificate has been signed by the creditors and the commissioners and is lying before the Lord Chancellor for confirmation, is, when he pays 10*s.* in the pound, to be deprived of his allowance because the dividend is made before the expiration of the twenty-one

days, during which the certificate must remain in the office before it is confirmed.

There are certain points which are clear: 1st, That the interval of twenty-one days, during which the certificate must remain before it is confirmed by the Chancellor, is not by virtue of any statutory enactment, but is a regulation of the Lord Chancellor's for the convenience of creditors; and that in the present case no petition was presented against the certificate.

2dly, It has been decided that when property accrues to the bankrupt during the twenty-one days, as a legacy, or a prize in the lottery, it passes to the assignees, *Webb* v. *Ward*, 7 *T. R.* 296; but the allowance to which the bankrupt is entitled by the statute is not property thus accruing after the bankruptcy, but property to which the bankrupt was entitled previous to the bankruptcy, and which the legislature has reserved out of the fund for the benefit of the bankrupt.

3dly, That if dividends are actually paid before the bankrupt has reasonable prospect of obtaining his certificate, the assignees and creditors are not bound to refund upon the bankrupt's afterwards obtaining his certificate, or the assignees would always be bound to retain for an indefinite period the maximum of allowance to which the bankrupt might by possibility be entitled; and he referred to *O'Brien* v. *Grierson*, 2 *Ball & Beatty*, 335; and *Groom* v. *Potts*, 6 *Term R.* 54. In *O'Brien* v. *Grierson*, it was determined that assignees who pay dividends on debts not proveable are not liable to refund; and the Lord Chancellor says, "It frequently happens that an executor distributes the assets of his

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testator as directed by a decree: to impeach this, on the ground of the decree being erroneous, the parties interested must come in due time; but in the present case the decree was not erroneous, and the distribution was made in the presence of all the parties interested, who made no objection, but acquiesced in the application made by the assignees, acting under the orders of Lord *Clare* and the commissioners." And in *Groom* v. *Potts*, the dividend was declared in 1791, and the bankrupt did not obtain his certificate till 1795. And Lord *Kenyon* says, "The assignees are mere trustees, and act wholly under the direction of the commissioners; when a dividend is declared, a right of action against the assignees accrues to every creditor for his proportion. In this case two dividends were declared at a time when the plaintiff had not obtained his certificate, and when *it was uncertain whether such certificate would be granted.* The assignees paid the creditors, under the orders of the commissioners; and the bankrupt, having four years afterwards obtained his certificate, now calls upon the representatives of the assignee for his allowance under the statute: but it would be monstrous to subject them to this demand. A bankrupt must put himself in a situation to demand this allowance, by obtaining his certificate before payment of the dividends by the assignees;" but in the present case the certificate had actually been signed by the commissioners, and notice was given to the assignees before any payment was made.

Mr. *Rose, contra*, said, that nothing was better settled, both by cases at law and decisions in bankruptcy, than that none of the privileges attached to the certificate until the allowance by the Chancellor. *Groom* v. *Potts*, 6 *T. R.* 548; *ex parte Grier*, 1 *Athyns*, 207.

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The words of Lord *Hardwicke*, in *ex parte Grier*, are, that if the creditors gave the allowance to the bankrupt before he had obtained his certificate, "it would be of no service to him, as they might take it from him again the next moment, for it would be liable in his hands to satisfy any creditors till he is entirely cleared by his certificate."

This was the construction of the clause in 5 Geo. 8. The same words are retained in the new act, and must be subject to the same construction. Lord *Hardwicke*'s expression sufficiently proves the fallacy of the distinction between property coming to the bankrupt *aliunde*, and that retained out of his own estate by statutory provision.

The only question then is, — has the bankrupt *obtained* his certificate within the meaning of the act? And he clearly has not; for Lord *Eldon*, in *ex parte Sawyer* (*a*), has decided, that until signed by the Chancellor the instrument is *not* a certificate.

Neither is the amount of dividend which has been in the present case declared, sufficient to entitle the bankrupt to his allowance: there must be a clear specific payment to the creditors of 10*s.* in the pound, before the five per cent. can be paid; which five per cent. must be given out of the surplus assets — not deducted from the dividend declared. To deduct five per cent. from 10*s.* 3*d.* in the pound, would reduce the actual dividend below the 10*s.* required by the statute.

Mr. *Montagu*, in reply, said, as to the first part, that in *ex parte Grier* (*b*) the application for the dividend was

(*a*) 1 *Rose*, 141. (*b*) 1 *Atkyns*, 207.

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upon the supposition that the allowance of the certificate did not affect the question, which was clearly a mistake; and that the words used by Lord *Hardwicke* confirmed the distinction, as it could not be contended that a creditor who had signed the certificate could recall the amount of the allowance. And as to the second point, that the words of the statute could not be misunderstood, which were, that when the net produce of the bankrupt's estate should pay the creditors 10*s.* in the pound, he should be allowed five per cent. "*out of such produce.*"

The VICE-CHANCELLOR expressed his opinion to be, that the bankrupt had not, at the time the dividend was declared and demandable by the creditors, obtained his certificate within the meaning of the act of parliament; and that the authorities against the certificate operating as a certificate until allowed by the Chancellor, were so strong that he could not declare the bankrupt to be entitled to the allowance.

The petition was dismissed.

Ex parte The GOVERNOR and COMPANY of the BANK of ENGLAND.—In the matter of MARSH, STRACEY, GRAHAM, and FAUNTLEROY.

L. C.
LINC. INN.
March 10, 1828.

A proof cannot be made by one person on behalf of several creditors entitled to prove, unless from necessity or by consent.

THE petition stated that the bankrupts, who were bankers in Berners-street, had been employed by numerous individuals to receive dividends due to them on sums standing in their names in the public funds, transferable at the Bank of England. That between the year 1814 and their bankruptcy, the bankrupts and each of them did, on various occasions, sell stock standing in the names of their customers, and transfer and assign the same in the books kept for that purpose at the Bank of England, by means of letters of attorney forged by *Fauntleroy*, out of the accounts of their customers; and the proceeds of the several sums so transferred were, from time to time, applied to the use of the bankrupts firm. That in September 1824 *James Hume* and *John Goodchild*, trustees of certain stock, discovered that the same had been sold out and transferred, under the authority of certain letters of attorney forged by *Fauntleroy*, who thereupon was prosecuted at the instance of the petitioners, convicted, and executed. That claims had been made by the several persons in the petition named, for the several sums of stock therein mentioned, the same having been transferred from their names by the bankrupts, or some or one of them, under letters of attorney forged by *Fauntleroy*. That the petitioners were willing to invest, in the names of the claimants respectively, sums of stock equal in amount to the sums so transferred, but that the petitioners had required such several claimants to prove the amount thereof under the

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commission for the petitioners' benefit, and which they had agreed to do; but, in order to avoid the expence arising from the multiplicity of proofs, and the delay which would be occasioned by the investigation thereof separately, the petitioners were desirous of being allowed to go in before the commissioners, and to tender one or more proofs in their own names.

The names of the claimants, being twenty-nine in number, were then stated, and the several sums of stock, the produce of which amounted to 266,222*l.* 12*s.*

The petition prayed, that they might be allowed to tender, in their own names and by the oath of their agent, one or more proof or proofs in respect of the several sums of stock so transferred, or in respect of so much thereof as would be proveable under the commission, and could be proved by the said claimants; and that the commissioners might be directed to receive such proof, without any objection that the debts due to the petitioners were, at and before the issuing of the commission, due and owing to the several claimants in the petition mentioned.

The *Attorney General*, Mr. Serjeant *Bosanquet*, Mr. *Horne*, and Mr. *Phillimore*, for the petitioners, submitted, that this would save expence and delay, and would be beneficial to all parties, without prejudice to any; and they cited *ex parte Cox* and *Greenwood*, where, upon the failure of the Portsmouth bank, the Admiralty, to prevent discontent in the fleet, took up the notes held by the sailors. The Admiralty was, by Lord *Eldon*, permitted to prove. (*a*)

(*a*) Cited in *ex parte Rogers, Buck*, 490.

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Mr. *Sugden* and Mr. *Montagu*, for the assignees of *Marsh* and Co., answered, that such an order could not be made, except in cases of necessity, unless by consent; and that the application was virtually to dispense with the settled law and practice in bankruptcy, and to establish one rule of law for the Bank of England, and another rule for all the other suitors of the Court. That the legislature had declared, both by whom the proof should be made, and in what cases the general rule should be relaxed. By 6 G. 4. c. 16. s. 46. every creditor may prove his debt by his own oath, and all bodies politic, and public companies incorporated, or authorized to sue or bring actions, may prove by an agent; and by s. 53. the person effecting any policy of insurance upon ships or goods with any person, as a subscriber or underwriter, becoming bankrupt, is entitled to prove any loss to which such bankrupt shall be liable in respect of such subscription, although the person effecting such policy was not beneficially interested in such ships or goods, in case the person so interested is not within the united realm.

The application must be made either by virtue of the right of the Bank as surety, or as assignees of the debt, or by the equitable interposition of the Court.

As to the right of surety, it was settled that no right accrued until actual payment of the whole, or of part in satisfaction of the whole. *Ex parte Moore*, 2 *G. & J.* 166; *ex parte Carter*, 2 *Gl. & Jam.* 239; *ex parte Ellis*, 2 *Gl. & Jam.* 312. But in the present case it was not pretended that the debt had been paid by the Bank. With respect to claiming as assignees of the debts, it was the constant practice to require the assignor and assignee to join in the deposition. *Cooke*, 145.

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As to the application to the equitable interposition of the Court, the case cited was not any authority, for the notes had been actually paid by the Admiralty. The sum, too, was very small, and the assignees did not oppose the application, the words, "the assignees by their counsel appearing and submitting to the order of the Court," being incorporated in the order: and, that although in cases of necessity the Court might possibly interpose, no such necessity existed in the present case; and it was a sort of champerty by which the Bank asked to sue in another's right. That, except in cases of necessity, the Court had never listened to such an application; and in this very bankruptcy Lord *Eldon* had refused permission for part of the trustees of the European Company to prove, and had required the proof to be made in the names of every partner, of whom there were 500; and that such a departure from the directions of the statute and settled practice might be most dangerous.

The LORD CHANCELLOR.

As no authority has been adduced to warrant me in deviating from the established practice, and as I do not consider the case of the Portsmouth bank, which was not opposed, an authority, I cannot, however I might feel inclined, make the order prayed.

The petition was dismissed with costs.

V. C.
LINC. INN.
March 3,
1828.

Ex parte BOTCHERLEY. — In the matter of WHITEHEAD.

The Court has not by 6 Geo. 4. c. 16. s. 108. jurisdiction against the execution creditor who does not prove.

ON the 31st of January 1826 a writ of *fieri facias* was issued by *Head*, upon a judgment obtained by default, and on the 4th of February 1826 the sheriff entered into possession. On the 22d of April a commission issued against *Whitehead*.

This was a petition by the assignees, praying that the Court would declare that *Head* was not entitled to the benefit of the execution, to the prejudice of the other creditors, and order the sheriff to withdraw from the possession of the premises, goods, and chattels of the bankrupt, under the execution, and deliver up the said goods, &c. to the petitioners, as assignees for distribution under the commission.

Mr. *Kenyon Parker*, for the execution creditor, denied the jurisdiction.

Mr. *Twiss* and Mr. *Whitmarsh* in support of the petition.

This Court sitting in bankruptcy has jurisdiction, or the 108th section of stat. 6 Geo. 4. is a mere nullity. It has been settled in *Taylor* v. *Taylor* (*a*), and in *Wymer* v. *Kemble* (*b*), that there is no remedy at law; that the course is by bill in equity, or by petition in bankruptcy; and it is also decided by Sir *Anthony Hart*, Vice-Chan-

(*a*) 5 *Barn. & Cresw.* 592. (*b*) 6 *Barn. & Cresw.* 479.

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cellor, in *Mitchell* v. *Knott* (*a*), that the remedy is not by bill, but by petition. Previous to the passing of 6 Geo. 4, this execution would have been valid, inasmuch as it is not pretended that an act of bankruptcy had then been committed; it is under section 108, therefore, which provides for cases where the execution is anterior to the act of bankruptcy, that the present application is made; and without the assistance of the Chancellor in bankruptcy, that clause is a dead letter. That the assignees have no remedy at law is clear, since they cannot maintain trover, without proving the two indispensable requisites in support of trover; viz. not only a right to the *property*, but also to the *possession* of the goods. Had an act of bankruptcy been committed, this would have been of course, as both the right of property and possession are presumed by law to have passed to the creditors; but no act of bankruptcy having been committed, the right had never passed out of the bankrupt, and no declaration which would support trover can by possibility be framed. The act does not declare that an execution obtained upon a judgment by *nil dicit* is void, but that the execution creditor shall be paid rateably with the others. If, then, a *creditor* proceeded by trover for the shares, to which the act declares the execution creditor not to be entitled, still the same difficulty exists as to averring the right to the property and possession, and another is added, viz. that a court of law could not enter into the question of account in dividing the proceeds. There is, therefore, no mode of dealing with the property — dividing it rateably as directed by the act, unless it be administered under the commission; and there is no power to bring the property within the administration in bankruptcy, except by the intervention of the Chan-

(*a*) *Ante*, page 294.

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cellor in bankruptcy. The absence of any words empowering the Lord Chancellor so to deal with the property taken is no argument against the jurisdiction, since there is a general jurisdiction founded on the Chancellor's jurisdiction in equity, to carry into effect the objects of the bankrupt laws. This is acknowledged by Lord *Eldon* in *ex parte Stephens* (*a*), and in *ex parte Bradley* (*b*), when his Lordship says, "I am aware of having weighed well, in the case cited (*c*), and in other cases, the authority under which the Chancellor acts in bankruptcy, in circumstances not specially provided for by the statutes; and I am convinced it was the intention of the legislature, in giving jurisdiction to the Chancellor in bankruptcy, to give him the power to use in bankruptcy the authority used in causes in chancery, where no specific authority is given by the statutes.

The VICE-CHANCELLOR.

The general rule is, that I have no jurisdiction over those who are strangers to the commission; and that rule must prevail here, unless an exception is created by section 108; but upon this subject I do not feel any difficulty; though, when that section is taken alone, there does appear some ambiguity in the expression, "shall avail himself of such security, to the prejudice of the other fair creditors." For duly estimating the intention of the legislature in passing this clause, it is necessary, first, to look at section 81, which provides generally, that all executions *bonâ fide* executed and levied more than two calendar months before the issuing of the commission, shall be valid. The 107th section then contains special directions respecting the dividends payable to such cre-

(*a*) 14 *Ves.* 450. (*b*) 1 *Rose*, 304. (*c*) *Ex parte Stevens.*

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ditors as shall have proved debts under the commission. A judgment creditor, therefore, by section 108, has a right to be paid dividends upon his debt, in manner therein prescribed. That section then provides, "that no creditor, though for a valuable consideration, who shall sue out execution upon any judgment obtained by default, confession, or *nil dicit*, shall avail himself of such execution, to the prejudice of other fair creditors." Now it appears to me manifest, that the legislature, in using this language, meant a creditor who should come in under the commission, and who, having sued out execution upon a judgment so obtained, shall not retain such execution, and take advantage of the commission in respect to any further rights. These two sections, therefore, must be taken together; and I am the more confirmed in this opinion by the expression in the last line of the section, directing that such creditor *shall be paid* rateably with the rest: but how is he to be paid rateably with the other creditors, unless he comes in with the rest under the commission. It appears, therefore, that this section, which does not declare such judgments void, leaves the case of a creditor obtaining execution upon judgments against the defendant before his bankruptcy exactly where it was before the passing of the act, unless the creditor comes in under the commission.

The petition was dismissed with costs.

Ex parte ARMITSTEAD. — In the matter of DILWORTH, ARTHINGTON, and BIRKETT.

LINC. INN. *August* 15, 1827. *March* 10, 1828.

DILWORTH, *Arthington*, and *Birkett* were bankers at Lancaster. The mode of keeping accounts with the petitioner and the other customers of *Dilworth* and Co. was as follows: — When the customer paid undue bills into the bank, such as the bankers approved, they were entered, on the day when they were paid, in the pass book or cheque book, and also in the books of the bank, to the credit of the customer: after such entry, the customer was at liberty to draw to the full amount appearing to his credit; and all bills so entered, whether made specially payable to the customer or not, were indorsed by him. An interest account was kept, not in the pass book, but in the bank books, in which the customer was debited with interest on each payment by the bank to him in cash from the day of such cash payment, and on each payment in bills from the period when the bills became due: and on the other hand, the customer had credit for interest from the time of each cash payment by him to *Dilworth* and Co., and from the time when each bill paid in by him became due. The accounts were balanced half-yearly; and if a bill was paid in which did not become due till after the expiration of the half year when the accounts were balanced, the customer was debited with interest upon such bill up to the time when it became due, and the balance only of the interest was entered in the pass book; and it was the constant usage and course of dealing of the bankers to use bills so paid in by paying them away, as convenience required, to their customers, without reference to the state of the account of the particular customer by whom they were paid in, or to

The proprietor of short bills, which are negociated by the country banker, is entitled to be indemnified from surplus security held by the London bankers.

What constitutes short bills.

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Ex parte ARMITSTEAD. In the matter of DILWORTH and others.

remit them to their London correspondents. The bankers were in the daily habit of paying away such bills to their customers, and the circulation of the town of Lancaster was conducted to a considerable extent by bills so paid in, and afterwards paid away to their different customers.

Barclay, Tritton and Co. were the London agents of *Dilworth* and Co., and were in the habit of assisting them with advances, upon remittances to *Barclay* and Co., by *Dilworth* and Co., of bills and notes which had been received by them from their customers at Lancaster. The bills so remitted to *Barclay* and Co. were generally indorsed by *Dilworth* and Co.; and *Barclay* and Co. were from time to time authorised, according to the state of their cash account, either to retain such of the bills as were undue until the time when they should become due, and then to receive and place the proceeds to the cash credit of the Lancaster house; or as their cash account became reduced, or was against the Lancaster house, either themselves to discount, or procure to be discounted by other persons the whole or part of the bills then undue, and place the proceeds to the cash credit of the bank.

In December 1825 *Barclay* and Co. applied to *Dilworth* and Co. for some further security. They accordingly, on the 3d of January 1826, deposited with Messrs. *Barclay* the title deeds of property to the value of 22,400*l.*

The following bills were paid by the petitioner to *Dilworth* and Co.: —

When paid.	Amount.	Drawn.	Payable.
1 Dec. 1825.	£250 0 0	7 Oct. 1825.	8 January 1826.
28 Dec. 1825.	£500 0 0	22 Oct. 1825.	23 January 1826.

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These two bills were indorsed by the petitioner at the respective times of paying them to *Dilworth* and Co., and were on such days placed in the pass book, and also in the books of the bank, to the petitioner's credit, according to the custom of the bank. The usual half yearly account between the bank and the petitioner was calculated and made up to the 31st day of December 1825, and the balance of interest ascertained. According to the custom of the bank, in making out such half yearly account, the two bills were respectively reduced into cash, and the petitioner was debited with interest thereon up to the time when they would respectively become due. By such means there was a cash balance of 1,541*l.* 6*s.* 7*d.* in favour of the petitioner on the 1st of January 1826. Such last-mentioned half-yearly account was, previously to the bankruptcy of *Dilworth* and Co., delivered to the petitioner, who made no objections thereto; and from the 11th of March 1822, when the petitioner first opened an account with the bank, various other half-yearly accounts had been delivered to the petitioner, in which he had been debited with interest on bills which had been by him indorsed and paid into the bank, but which were not due at the respective times of making up such half-yearly accounts; and the cash balance therein stated to be due to the petitioner was increased by the amount of the bills, and the petitioner never made any objection thereto. The bill for 250*l.* was indorsed generally by *Dilworth* and Co., and by them on the same day remitted to *Barclay* and Co., who, on the 19th of December 1825, discounted the same, and placed the amount, after deducting the discount, to *Dilworth* and Co.'s cash account, which was then in favour of Messrs. *Barclay* and Co. The bill for 500*l.* was in like manner indorsed generally, and remitted, on the 17th of January 1826,

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to *Barclay* and Co., the cash account being still in their favour, and was retained by them till the 1st of May 1826, when it became due, and the proceeds were then received by *Barclay* and Co.

In February 1826 *Dilworth*, *Arthington*, and *Birkett* were declared bankrupts. At this time there was a balance due from them to *Barclay* and Co. of about 10,848*l.*

The petitioner claimed the amount of such bills out of the proceeds of the securities which had been deposited by *Dilworth* and Co. with *Barclay* and Co., or out of such surplus as should remain after satisfying the lien of *Barclay* and Co.

Mr. *Heald* and Mr. *Rose* for the petition.

The petitioner would have been entitled to have such bills as were deposited with his bankers delivered up as short bills, had they remained in their hands at the time of the bankruptcy, within the cases in the matter of *Boldero*, 1 *Rose*, 232. The principle is not altered by the fact of their having been, without the consent of the petitioner, deposited with *Barclay* and Co., inasmuch as *Barclay* and Co., who had a security to cover their balance, having applied the petitioner's bills for the purpose to which they ought first to have applied those securities, the petitioner has a right to so much of such securities as ought in the first instance to have been so applied. *Thompson* v. *Giles* (*a*) is a direct authority, not only as to the principle, but even in respect of the peculiar mode of dealings to which such principle of law has already been applied. In both cases,

(*a*) 2 *Barn. & Cresw.* 422.

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though the entries were as bills, the amount was carried to the cash column: but being entered as bills, they still remained the property of the customer; and the only authority which the bankers had over them, was to use them as a guarantee in respect of that cash account, for which, upon the faith of such bills, they had prospectively given credit to the customer. They had nothing more than a lien against the customer, in case he should overdraw his actual cash balance. In such case only were they justified in parting with the bills; but while the cash balance was, as it is not denied always to have been, in the petitioner's favour, it is *prima facie* evidence that the bills remained his property, and it lies upon those who deny such property to shew that such right had been altered; and this was the opinion of the Court of King's Bench in *Thompson* v. *Giles*. It would be a gross fallacy to call an advance of money at a certain interest, upon the security of those bills, a *discount* of the bills. Had no bankruptcy taken place, it is quite clear that the Court would have compelled the Lancaster bank to have redeemed these bills from the hands of *Barclay* and Co., who had other securities to which they ought to resort; and whatever equities the petitioner would in such case have had against *Dilworth* and Co., they now have against their assignees.

Mr. *Sugden*, Mr. *Montagu*, and Mr. *Geldart* against the petition.

The whole transaction is inconsistent with the principle of the cases respecting short bills; inasmuch as these bills were not deposited for the purpose of the bankers, as agents, receiving the proceeds when due, for the very property in them had passed from the peti-

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tioner by indorsement. They were in fact discounted: the moment they were paid into the bank, the cash account of the customer was increased *pro tanto*, and the bank acquired the fullest right of negociating and dealing with the securities for which they had in effect advanced cash, by rendering cash to the amount of the bills liable to the cheques of the customer. The transaction is in substance the same as if the bills had been actually discounted, and the money at the same time paid in to the cash account of the person discounting them. The mere absence of the formal delivery and re-delivery of the money does not vary the real nature of the case. The bills were dealt with as cash, and come within the rule in *ex parte Sergeant*, 1 *Rose*, 158, where the Lord Chancellor decided, that the customer, after paying in bills, and having credit in cash, and drawing or being entitled to draw upon the bankers, would be precluded from recurring to the bills specifically.

It is a material distinction between this case and *Thompson* v. *Giles* (*a*), that in the case at law the bills still remained in the possession of the bankers; but here they were abroad at the time of the bankruptcy, and new rights had been created by the general indorsement to parties not connected with the petitioner — not by fraud on the part of the bankers, so as to raise an equity in the petitioner's favour, but by the concurrence of the petitioner, who had himself given them circulation. All which the Court decided in *Thompson* v. *Giles* was, that notwithstanding the indorsement generally, the bills being in the possession of the bankers at the time of the

(*a*) 2 *Barn. & Cresw.* 422.

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bankruptcy, must be delivered up; but here the bills had been paid away as their own, they having the order and disposition of them, and cannot now be traced. The moment permission is given to discount or negociate them, the character of short bills is gone; nor can this Court marshal securities, and substitute the property in a security given to other parties for other purposes. If *Thompson* v. *Giles* (*a*) extends beyond what is here admitted, it is at variance with the authorities of this Court: but even supposing it to be law, still the fact that credit is given in all the half-yearly accounts for these bills not yet due, is a fact which distinguishes it from that case; in which there was nothing, as in the present case, to shew that the customer had liberty to draw for the full amount.

The circumstance of there being a surplus security in the hands of *Barclay* and Co., after payment of the cash balance due to them, cannot convert discounted bills into short bills. The petitioner could not have got back these bills from *Barclay* and Co., neither can he by any circuity through their means make use of property pledged to them.

The LORD CHANCELLOR.

Though my first impression, certainly, was, that this was a mere discount transaction, I am of opinion, upon a more minute investigation of the evidence, that the case falls within the principle of *Thompson* v. *Giles*. (*a*) I shall, however, take time more maturely to consider this; and if I find nothing to alter my present opinion, it will

(*a*) 2 *Barn. & Cresw.* 422.

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then be necessary for me to consider whether that case be at variance with the decisions in this Court upon the subject of short bills. If not, the decision in *Thompson* v. *Giles* must, I am of opinion, govern this case.

The LORD CHANCELLOR.

March 10, 1827.

In this case it appears that *Dilworth* and Co., the bankrupts, carried on business as bankers at Lancaster, and the petitioner *Armitstead* kept an account with them, as his bankers. *Barclay* and Co. were the London bankers and correspondents of *Dilworth* and Co. The accounts between the two firms were considerable, and about the year 1825 some title deeds were deposited by *Dilworth* and Co. with *Barclay* and Co., as a security for the balance of the accounts. *Armitstead* being in possession of two bills of exchange, placed them, after indorsing them, in the hands of *Dilworth* and Co. *Dilworth* and Co. transmitted them to *Barclay* and Co., who discounted one of them: the other remained in the hands of *Barclay* and Co. until after the bankruptcy of *Dilworth* and Co., when the proceeds were received of the drawee of the bill by *Barclay* and Co., and the account between *Dilworth* and Co. and *Barclay* and Co., and in respect of which they held the deeds, was reduced by the amount of these bills.

The main question was, whether these bills, thus deposited in the hands of *Dilworth* and Co., had become their property. *Armitstead* swears that he gave *Dilworth* and Co. no *authority* to discount, deposit, or pledge these bills. It was contended for the assignees, on the other hand, that from the nature of the account between

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Dilworth and Co. and *Armitstead*, and particularly from the manner in which the bills were entered in the account, that an agreement by implication must be considered as having existed between them, that they should be the property of *Dilworth* and Co. This I understand to have been the tendency and effect of the argument. The question is, whether, although they had the controul of them, they were not bound to retain them in their own possession, and receive the proceeds of them when at maturity for *Armitstead* their employer. It is material to state, that when these bills were deposited with *Dilworth* and Co., the account was in favour of *Armitstead*, and that it continued so until the bankruptcy, at which time it was considerably in his favour.

The question arising out of the manner in which the account between *Armitstead* and *Dilworth* and Co. was kept, was decided in *Thompson* v. *Giles*. I have compared the statements in this case on that point, with the statement in the 2d vol. of *Barn. & Cres.*, where that case is reported, and I find that there is no material distinction between them. I entertain little doubt but that the mode of keeping them was the same, because it appears from that case that such was the usual mode in the county of Lancaster, of keeping accounts between bankers and their customers. I am satisfied that the mode of keeping the accounts in this case; and the inferences to be drawn from it are the same as in *Thompson* v. *Giles*. On the part of the assignees of *Dilworth* and Co., some observations were made on the doctrine laid down in that case. I have carefully considered it, and looked through it several times; and I must say, after doing so, that I entirely concur with that judgment. The judges who delivered their opinions thought

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that there was no difficulty in coming to that conclusion, and that there was nothing from which it could be inferred that the property in the bills was to be transferred to the bankers. In this case I am of opinion, that *Dilworth* and Co. had no right to dispose of the bills in the way in which they have applied them. The consequence is, that as the proceeds of the bills were improperly applied, in reducing the balance between *Dilworth* and Co. and *Barclay* and Co., and as the latter have a security more than sufficient to cover the balance of their account, *Armitstead* is entitled to stand in their situation to the extent to which the balance has been thus reduced; and the prayer of the petition is proper, and must be granted.

The Court of King's Bench was of opinion, in *Thompson* v. *Giles*, that the manner in which the interest account was kept was of no consequence.

V. C. LINC. INN, *March* 18, 1828.

Ex parte BERNASCONI. — In the matter of CHAMBERS and SON.

A creditor who has proved will, upon a petition by the assignees, be restrained from issuing execution against the property of the bankrupt in the possession of the assignees.

THIS was a petition by the assignees of *Chambers* and Son. The commission issued in November 1825. In December 1825 *William Chambers*, the brother of *Chambers* the elder, proved a debt of 36*l.* 7*s.* 8*d.* against the joint estate, and 4,027*l.* 9*s.* 7*d.* against the separate estate of *Chambers* the elder, being principal and interest upon a bill of exchange, accepted by *Chambers* the elder, for 3,794*l.* 2*s.* 6*d.* In November 1827 *William Chambers* commenced an action of debt against *Chambers* the elder, for 25,864*l.* 2*s.* 6*d.*, which in the declaration he stated to be due to him, in the following manner:

	£	s.	d.
Promissory note, dated 27th August 1819, for 5,794*l.* 2*s.* 6*d.*, being the amount of 198*l.* 6*s.* 8*d.* long annuities, at 19½ years' purchase, payable three months after sight, with interest on the said sum of 5,794*l.* 2*s.* 6*d.*; which note was presented on the 1st of August 1825	5,794	2	6
Promissory note, dated 25th March 1820, for 628*l.* payable with interest, being the purchase money of one-fifth part of Moor-street and Walderslade estate	628	0	0
Promissory note, dated 6th October 1826, payable on demand, for 100*l.* with interest, demanded on the 1st October 1827	100	0	0
Promissory note, dated 5th May 1827, payable on demand, for 350*l.* with interest, demanded 1st October 1827	350	0	0
For money paid	5,000	0	0
For money lent	5,000	0	0
For money had and received	5,000	0	0
For interest	1,000	0	0
Upon an account stated	5,000	0	0
	25,864	2	6

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On the 26th November 1827 final judgment was signed by default, for the debt and costs. Part of the separate property belonging to *Chambers* the elder, at the date of the commission, consisted of a freehold farm, with farming utensils, stock, &c.; of which the petitioners, as assignees, had taken possession, and had not yet sold. Upon the judgment so obtained, *William Chambers* caused the whole of the farming utensils, stock, &c., to be taken in execution.

The petitioners submitted, that *William Chambers* having proved a debt, had submitted to take the benefit of the commission, and had acquiesced therein, and become thereby a cestuique trust, with others, among whom the property and effects so taken in execution was distributable by the petitioners as assignees and trustees; and prayed that *William Chambers* might be directed forthwith to give directions to the sheriff to withdraw from the possession of the property and effects so taken in execution, and to re-deliver the possession thereof to the petitioners; and that he might be ordered to pay the costs of this application.

Mr. *Sugden* and Mr. *Collinson*, for the petition, shortly stated the case.

Mr. *Pepys*, Mr. *Knight*, and Mr. *Chilton* for the execution creditor.

The Court has no jurisdiction. The words of the act of parliament, section 59, are, that "the proving or claiming a debt under the commission, by any creditor, shall be deemed an election by such creditor to take the benefit of such commission, with respect to the debt so proved or claimed." This, therefore, is, at the

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utmost, an election in respect to that part of the debt which was proved; and the proof of one distinct part of a debt does not prevent the creditor from proceeding at law for the remainder. This is proved by *Harley* v. *Greenwood* (*a*), confirmed by *Bridgett* v. *Mills* (*b*); and the words of *Holroyd, J.*, in *Harley* v. *Greenwood*, are conclusive: "The words of the statute do not make the proof of a debt an election with respect to separate and distinct debts, but only with respect to the debt actually proved or claimed." The distinction between the debt proved and the debt for which proceedings at law were taken, was exactly the same as what is found in the present case — the proof of one bill of exchange out of several — all of which he might have proved. That Judge proceeds: "The words, therefore, of this part of the section do not make the proof of that distinct debt such an election to take the benefit of the commission as to deprive the creditor of his right of action." With respect, too, to the jurisdiction, the words are important: "If," his Lordship says, "an action be brought after a proof of a debt, it may be a ground for a defendant either to apply to the Court in which the action is brought to stay the proceedings, or to the Chancellor to expunge the debt." It follows, then, that having a right to the action, the plaintiff has a right to the execution consequent upon it.

The course which ought to have been adopted by the petitioners, was to have applied to stay the action so far as related to the bill proved, or to the Lord Chancellor, to be allowed the benefit of the execution *pro tanto*; but it is impossible for this Court to stay the execution, or to limit the action to that portion of the debt which has

(*a*) 5 *Barn. & Ald.* 95. (*b*) 4 *Bing.* 18.

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not been proved. Neither is it competent to this Court to try the question raised in the petition, as to the right to the property claimed by the assignees. This ought to have been tried by trover against the sheriff.

Another objection to the present course of proceeding is, that the clause in section 59 was meant for the benefit of the bankrupt alone; but this application is by the assignees.

The debt for which the action was brought consists of three parts:

1st. Debt proveable and proved.

2d. Proveable, but not proved; and

3d. Not proveable, because arising from money lent to *Chambers* the elder after his bankruptcy. It can hardly be contended, since the decisions of *Harley* v. *Greenwood* (*a*), and *Bridgett* v. *Mills* (*b*), that the election extended to the third class of debts.

Mr. *Sugden* in reply.

The cases at law do not apply. It may be quite consistent that a creditor, who has proved a part of his debt, shall be permitted to sustain an action for another part; for instance, to establish the validity of the debt, or to prevent the operation of the statute of limitations; but in no case can he avail himself of such action, to the prejudice of the commission which he has adopted, or of the assignees, whom he has acknowledged as his trustees. It is settled in *ex parte Glover* (*c*), that it is only where

(*a*) 5 *Barn. & Ald.* 95. (*b*) 4 *Bing.* 18. (*c*) 1 *Gl. & Jam.* 270.

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debts are of a distinct nature, as *indebitatus assumpsit* and bond, that proceeding at law is compatible with a prior proof. *Ex parte Bozannet* (*a*) also is decisive; for there the mere obtaining of an order under the commission was held to be sufficient to preclude a creditor, who afterwards obtained judgment and issued out execution, from availing himself of such execution; and it is remarkable that such execution creditor, who had not proved, was restrained from disturbing the administration of the property under the commission, not at the instance of the assignees or creditors, but of a mere stranger — a purchaser under the commission. *A fortiori*, therefore, have the trustees that right. Neither is there any thing in the 59th section to warrant the supposition that such restraining power is to be confined to the bankrupt only; since nothing can be more general than the expression, that the proving or claiming a debt "shall be deemed an election by such creditor." In *ex parte Hornby* (*b*) the Vice-Chancellor held, that proof was equivalent to payment; and the creditor, having obtained an order to prove, was thereby bound to relinquish any right which he might have set up adversely to the assignees. The creditor, therefore, having proved, cannot voluntarily retire from his proof, nor can he, having proceeded at law upon several portions of a debt which he chose to consolidate, and which included that portion which he had proved, afterwards separate them, and marshal the proceeds of the execution.

The VICE-CHANCELLOR.

It appears that two months after the issuing of this commission, under which *William Chambers* proved a

(*a*) 1 *Rose*, 181. (*b*) *Buck*, 351.

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separate debt against *Abraham Chambers* the elder, *William Chambers* proceeded at law for a separate debt of 25,000*l.* and upwards, including the debt already proved; and having obtained judgment by default, proceeded to take the bankrupt's property in execution. It is contended by the assignees, that as *William Chambers* took advantage of the commission, to protect himself in the first instance, he could not take that property in execution, which was vested in trustees, to be distributed among himself and the rest of the creditors. The words of Sir *S. Romilly's* act, applicable to this subject, are, "the proving or claiming a debt under the commission by any creditor, shall be deemed an election by such creditor to take the benefit of such commission, with respect to the debt so proved or claimed;" and the same words are retained in the 6 Geo. 4. c. 16. Many cases have been cited to prove the construction put upon those words by the different Courts, and the result of those decisions has been correctly stated to be, that proof upon one debt does not preclude the right of proceeding at law upon another. This proposition is supported by *Harley* v. *Greenwood*, and *Watson* v. *Medex*.

It is admitted by *William Chambers*, in the present case, that the action was brought to recover as well the debt which had been proved, as that which was not proved; but this was not the case in *Harley* v. *Greenwood*, where that bill of exchange, which had been proved, formed no part of the claim at law. That case, therefore, does not in strictness apply; and the question here is, whether a creditor shall be permitted to proceed at law, in respect of a debt which he has already proved. In *Harley* v. *Greenwood*, Mr. Justice *Holroyd* observes, that "if an action be brought after a proof of a debt, it may be a ground for the defendant either to apply to the

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Court in which the action is brought to stay the proceedings, or to the Chancellor to expunge the debt." Mr. Justice *Bayley* also expresses his opinion to be, that the statute does not make the proof of the debt under the commission an absolute bar to the remedy at law: and this doctrine is confirmed by the more recent case in the Common Pleas, *Bridget* v. *Mills*. (*a*)

But upon the present petition it has been objected, that the statute and the former decisions relate to disputes between the bankrupt and the creditor; and that this petition is not between the bankrupt and the creditor, but between the assignees and the creditor. The nature and extent of the jurisdiction in bankruptcy, with respect to assignees, is stated in *ex parte Hanson* (*b*), where Lord *Eldon* says what is indisputable, that the Lord Chancellor exercises in bankruptcy both a legal and an equitable jurisdiction. The question then is, whether, by section 59, I am bound to declare that the election there meant is an election merely between the creditor and the bankrupt; or whether it is not a more extensive election, and applicable also as between the creditor so electing and all the rest of the creditors. I cannot conceive that election was ever meant to be limited between the creditor and the bankrupt only. The expression in the act is general, and there are no words of restriction.

According to the old law, as laid down in *ex parte Wright* (*c*), it was competent for a creditor who had proved, upon refunding any dividend which he might have received, to proceed at law. This state of the law must have been present to the minds of the legislature, in

(*a*) 4 *Bing.* 18. (*b*) 12 *Ves.* 348. (*c*) 2 *Ves. Jun.* 9.

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framing the existing statute; yet there is nothing in this act to warrant the supposition that election is so limited; and I have no hesitation in saying, that proof operates as an election, as well between the creditor and the assignees as between the creditor and the bankrupt.

I agree in the proposition of the petitioners, that a creditor, having proved under a commission, should not be permitted to seize that property which was meant for distribution between himself and others. I am satisfied, therefore, that I have a jurisdiction sufficiently extensive to prevent such seizure; and my opinion is strongly confirmed by the decision of Lord *Eldon* in *ex parte Bozannet* (*a*), where even a stranger to the commission, upon the mere application for an order under a commission, was held to have brought himself so within the jurisdiction as to be restrained from disturbing a purchaser under that commission; and I am satisfied, too, that the facts as well as the law warrant me in restraining the respondent from proceeding further with his execution against the property, distributable under the commission.

This is a new case, but I cannot hesitate to make this order. The action must be considered as a proceeding for the same debt as had been proved, for he has declared upon the whole, and issued execution for the whole; and having so mixed the debts, he cannot now separate them. The order must be as prayed.

(*a*) 1 *Rose*, 131.

REX *v.* DUDMAN. (*a*)

LEWES ASSIZES, 1825.

Quære whether an affidavit sworn before the petition was filed will support an indictment for perjury.

THIS was an indictment for perjury, in an affidavit upon a petition to supersede a commission of bankruptcy. The affidavit was sworn before the petition was presented.

The Court objected to the indictment—that it did not contain an averment; that the affidavit had been sworn in a petition which was pending; or, that it was to be used with reference to such petition. The substance of the objection was, that the affidavit was not sworn in a judicial proceeding.

Mr. *Adolphus* for the prisoner.

Mr. *Law* for the Crown.

The Court was at first inclined to think that the objection was unanswerable; but after argument, seemed to doubt; and declined to pronounce any judgment, as there was another valid objection. (*b*)

(*a*) *Ex relatione* Mr. *Law*. (*b*) See 4 *Barn. & Cresw.* 850.

V. C. LINC. INN, *Jan.* 14, 1822.

Ex parte CHARLTON. — In the matter of CHARLTON.

The Vice-Chancellor has not jurisdiction to direct a petition to be heard before the day for hearing fixed by the Lord Chancellor.

THIS petition had been answered by the Lord Chancellor for the next day of petitions.

Before the petition day the petition was called on, it having been advanced to the head of the paper, upon motion, with notice.

Mr. *Sugden* and Mr. *Montagu* for the petition.

Mr. *Rose, contra,* objected that the petition being answered for the next day of petitions, the Vice-Chancellor had not jurisdiction to appoint the hearing for a previous day, which would virtually be a reversal of the Lord Chancellor's order. The petition could only be advanced by consent.

The VICE-CHANCELLOR admitted the objection, observing, that the Lord Chancellor having, by his answer, allowed the respondent until the next day of petitions, he could not compel his appearance before that day, though notice had been given. (*a*)

(*a*) The same point was decided in *ex parte Blundell,* in the matter of *Blundell.* March 19, 1828. Mr. *Montagu* for the petition. Mr. *Rose contra.*

Ex parte BYGRAVE and others. — In the matter of PRATT and RAVENSCROFT.

V. C. LINC. INN, *March* 22, 1826.

A joint commission, invalid in its concoction, may be superseded as to one of the bankrupts.

THIS was a petition to supersede the joint commission against *Pratt* and *Ravenscroft*, upon the ground that *Pratt* had not committed an act of bankruptcy; and that the joint commission could not be supported at law.

Mr. *Rose* for the petition.

Against this petition it was contended by Mr. *Montagu* and Mr. *Garratt*, that although the commission was invalid as to *Pratt*, it was valid as to *Ravenscroft*, and might be supported as to him by 3 Geo. 4. c. 74. (*a*) This commission, therefore, ought to be superseded as to *Pratt*, without prejudice as to *Ravenscroft*.

Mr. *Rose* in reply.

The statute 3 Geo. 4. c. 74. applies only to cases where the original commission is valid in its concoction, and does not enable the Court to give validity to a commission which is originally invalid.

The VICE-CHANCELLOR (*b*) ordered the commission to be superseded as far as regarded *Pratt*, without prejudice to the validity of the commission as regarded *Ravenscroft*, or to his certificate thereunder.

(*a*) 6 Geo. 4. c. 16. s. 16. (*b*) Sir *John Leach*.

V. C. LINC. INN, *March* 20, 1828.

Practice as to costs, the petitioner not appearing.

Ex parte GARTH.

MR. *Duckworth*, for the respondent, asked for his costs, the petitioner not appearing; and he produced an office copy of the petitioner's affidavit of service.

It was said, that in practice the respondent was not entitled to his costs, unless, before the rising of the Court, he produced his own affidavit of having been served; and *ex parte Astell*, *Buck*, 396, was cited.

The VICE-CHANCELLOR.

What better evidence can there be against the petitioner, of the respondent's having been served, than the petitioner's own affidavit of service?

The petition was dismissed with costs.

V. C. LINC. INN, *March* 19, 1828.

A creditor cannot proceed at law upon one of two bills for goods sold, due and dishonoured before proof on the other, but returned after the proof.

Ex parte SCHLESINGER. — In the matter of SCHLESINGER.

A PETITION by the bankrupt stated, that on the 6th of April 1826 the petitioner had purchased goods to the amount of 135*l.* 16*s.* 6*d.* from *Edwards*, for which, on the 14th of April 1826, he gave *Edwards* a bill of exchange for that sum, payable three months after date. That on the 11th of April 1826 *Edwards* sold to the petitioner another parcel of goods, to the amount of 88*l.* 3*s.*, for which the petitioner, on the 24th of the same month, gave a bill for that sum, payable three months after date. These bills became due respectively on the 17th and 27th of July 1826, and were dishonoured. On

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the 6th of November 1826 a commission issued against the petitioner, under which, on the 25th of November, *Edwards* proved the bill of 135*l.* 16*s.* 6*d.* In January 1827 *Edwards* commenced an action against the petitioner upon the bill for 88*l.* 3*s.*

The petition prayed that *Edwards* might be restrained from any further proceedings in the action.

In answer to the petition of *Edwards*, it was stated that at the time of proving the bill for 135*l.* 16*s.* 6*d.* he had not taken up, nor was he in possession of, the bill for 88*l.* 3*s.*, nor did he receive the same until the 25th of December 1826, on which day he received it from *Richard Budd*, to whom, previous to the proof of the bill for 135*l.*, it had been transferred for a valuable consideration, and who had in vain applied to the bankrupt for payment.

Mr. *Rose* and Mr. *Chandless* for the petition.

The two bills, having been both dishonoured before the bankruptcy, were the subject of one action and of one proof. The fact of giving the bills did not alter the nature of the debt; they amounted only to a postponement of the payment, and when returned dishonoured, the debt in its original form revived; and it is not competent to a creditor to split a simple contract debt into two, so as to prove for one part, and proceed at law for the other: and they cited *ex parte Glover*, 1 *Gl. & Jam.*

Mr. *Cooper* for the detaining creditor.

This bill not being in the possession of the creditor at the time the other was proved, was the proper subject

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of an action at law, within the principle of *ex parte Sly* (*a*); and it is within the very letter of *Watson* v. *Medex* (*b*), *Harley* v. *Greenwood* (*c*), and *Bridget* v. *Mills*. (*d*) *Ex parte Glover* (*e*) does not apply, for in that case the proof was subsequent to the action; and there is no question but that, by the express words of the act, proof of *any* debt operates as a relinquishment of an action previously brought, although for a distinct demand. *Ex parte Dickson* (*f*), and *ex parte Hardenberg* (*g*), were cases both proving this principle; for in each was the application under the commission subsequent to the commencement of proceedings at law; and the statute in such case declares (*h*) that a creditor shall not prove *a* debt or have *any* claim entered without relinquishing such action: but where the proof precedes the action, it is expressly limited in the act to be an election only with respect to the debt proved. In this case, as in *ex parte Sly*, the cause of action arose after the proof, and the debts, therefore, are perfectly distinct. In *ex parte Glover* it was expressly declared by the Vice-Chancellor, that the statute did not apply to actions for distinct demands brought *subsequently* to proof or claim.

Mr. *Rose* in reply.

The cases of *Watson* v. *Medex*, and *Harley* v. *Greenwood*, though apparently opposed to the present application, are, in fact, authorities in favour of the petitioner. In the last case the plaintiff declared upon four bills of exchange, and it was held that the fact of having proved another bill under the commission could not be pleaded

(*a*) 2 *Gl. & Jam.* 1.
(*b*) 1 *Barn. & Ald.* 121.
(*c*) 5 *Barn. & Ald.* 95.
(*d*) 4 *Bing.* 18.
(*e*) 1 *Gl. & Jam.* 270.
(*f*) 1 *Rose*, 98.
(*g*) 1 *Rose*, 204.
(*h*) Section 59.

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in bar to the action for those four bills. This decision, therefore, only extended to the point of pleading at law, since it was expressly laid down, that though the proof could not be pleaded in bar, yet that it was ground for applying to the Court in which the action was brought to stay proceedings, or to the Chancellor to expunge the debt. There were in that case, in the eye of the law, five distinct contracts, and a court of law would not, on account of his proving one, interfere with his legal rights with respect to the other; but this Court will not permit a creditor to take advantage of the commission for one purpose, while he obstructs the administration of it by confining the bankrupt. The only case in which proceeding at law is compatible with proof under the commission, is where the debts are of a distinct nature — that is, upon simple contract and specialty. *Ex parte Grosvenor*, 14 *Ves.* 587; *ex parte Glover*, 1 *Gl. & Jam.* 270. *Ex parte Sly* has settled the point as to what shall be the test of a creditor's right to proceed at law or not, viz. was it in his power when he proved one of the bills to have proved the other. In *ex parte Sly* he clearly could not, for the bill was undue and outstanding at the time; but in the present case both bills had been dishonoured before the bankruptcy, and it is a fallacy to say that the bill was outstanding when he had actually received notice of its dishonour, and without doubt had been debited with the amount by *Budd*, in whose hands the creditor allowed it to remain. It was competent to him to prove or to claim, and he cannot, therefore, proceed at law.

The VICE-CHANCELLOR.

The first question is, did this bill constitute a debt distinct from the former? I am of opinion that it did

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not, but that the bills were only two parts of one simple contract debt, though they were given at different dates. Had they remained in the drawer's hands, without doubt they might have been exhibited as security for the goods sold, and recoverable in an action. In *ex parte Sly* the bill upon which the action was commenced did not become due until after the proof of the first, and the drawer was not then in a situation to prove it; the Vice-Chancellor, therefore, rightly treated it as distinct debt. But here both bills were given under circumstances which would have supported one action: they were both dishonoured at the date of the commission, and before the proof of the one it is not denied that he had had notice of the dishonour of the other. That bill, therefore, might also have been proved, or at least claimed. The order must be as prayed.

Ex parte MOGG. — In the matter of MOGG.

V. C. LINC. INN, *March* 19, 1828.

The husband must join in a docket by a feme covert, upon a debt due to her in autre droit.

THIS was a petition by the bankrupt to supersede the commission upon two grounds.

1st. That the commission had issued on the petition of *Mary Foote*, the wife of —— *Foote*, for a debt due to her as executrix. That the husband of *Mary Foote* was alive when the docket was struck, but had not joined her in the affidavit on striking the docket, nor in the petition on which the commission was issued.

2dly. That there was not a sufficient trading — the commission having issued in September 1826, and the trading proved being anterior to the passing of 6 Geo. 4. c. 16.

Mr. *Agar* and Mr. *Montagu* for the petition.

1st. By statute 6 Geo. 4. c. 16. s. 13. the petitioning creditor shall, before any commission be granted, make affidavit of the truth of his debt; and shall likewise give a bond to the Lord Chancellor, conditioned for proving his debt. Upon this clause some difficulties have arisen both with respect to debts due to infants and in cases of coverture.

It is settled in various cases, that if a debt to a wife be due in *autre droit*, she must join with her husband in suing out a commission on such debt.

In 7 *Vin. Abr.* 66, art. 10. is as follows: Where debt is due to wife, as administratrix, the husband alone cannot take oath of this as a debt due to himself, in

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order for a commission of bankruptcy. *Ex parte Staples*, *M. S. M. T.* 1734.

In *Master* v. *Winter*, 8 Geo. 2. (*a*) the petitioning creditor's debt was due in *autre droit*, and that her husband ought to have joined with her in suing out the commission; and it was held by the Chief Justice, that the petition ought to have been by the husband and wife, for the debt due to her in *autre droit*: and though it is true that the wife alone could not bring an action for this debt, without joining the husband, yet the husband's joining is only for conformity: and on the other hand, the husband could not have brought an action without joining his wife. Suppose the wife had died, the husband would not, by taking administration to her, have been entitled to this debt; but there must have been administration *de bonis non* of the first testator. If the husband had not been the petitioning creditor, but had wanted to have proved his debt under the commission, he and his wife must have claimed it before the commissioners; and therefore he held it clear, that the commission was not properly sued out, and therefore the plaintiff was nonsuited.

So, too, in *Rumsey* v. *George* (*b*), it was determined, that a husband alone cannot be the petitioning creditor to support a commission of bankruptcy in respect of a debt composed partly of a sum of money due to him in his own right, and partly of a sum due to his wife *dum sola*. And in this case, *ex parte Staples* and *Master* v. *Winter*

(*a*) MSS. of the author of a System of the Bankrupt Laws, by a Commissioner of Bankrupts. Published 1735. Cited, *Davies*, 464, and 2 *Mont. B. L.* 1 *Ed.* p. 129.

(*b*) 1 *M. & Selw.* 176.

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were cited. And *ex parte Barber* (*a*) is to the same effect, and founded on the same principle.

There are analogous cases with respect to the inability of an infant being the petitioning creditor. *Ex parte Barrow* (*b*), and *ex parte Morton.* (*c*) In *Guthrie* v. *Fisk* (*d*), Mr. Justice *Bayley* says, "The bond must be given by the petitioning creditor, and the remedy must be against him."

2dly. They contended that there was not any trading since 6 Geo. 4. c. 16., and it had been decided in *Maggs* v. *Hunt* (*e*), that an act of bankruptcy previous to 1st September 1825 would not support a commission issued after that day.

Mr. *Knight* for the respondents.

As to the first objection: with respect to the docket, the affidavit is not calculated to mislead. It is as follows: "*Mary Foote*, wife of *Henry Foote*, of Mere in the county of Wilts, (late *Mary Love*, spinster, sole executrix named in the last will and testament of *John Mogg*, deceased,) maketh oath and saith, that *William Mogg* of, &c. is now justly indebted to this deponent, as executrix aforesaid, in the sum of one hundred pounds and upwards, for principal and interest due to this deponent as executrix aforesaid, by virtue of one bond or obligation, bearing date the second day of September 1814, entered into by the said *William Mogg* to the said *John Mogg*, in the penal sum of 160*l.*, conditioned, &c. And this deponent further saith, that no part of the said sum of one hundred pounds

(*a*) 1 *Gl & J.* 1.
(*b*) 3 *Ves.* 554.
(*c*) *Buck*, 42.
(*d*) 3 *Starkie*, 151; 3 *Barn. & Cresw.* 185.
(*e*) 4 *Bing.* 212.

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and upwards hath been paid or otherwise satisfied to this deponent, as executrix aforesaid, or to the said *Henry Foote*, her husband. And this deponent further saith, that the said *William Mogg* hath become bankrupt," &c. But in *ex parte Staples* (*a*) it was the contrary, and must necessarily have been the averment of an untruth. Neither is the bond objectionable. The acts of parliament have not received a literal construction, or no commission could issue upon a debt due to a feme covert. It was decided in *ex parte Hodgkinson* (*b*), that the bond may be executed by one only of two or more partners; and in *ex parte Blakey* (*c*), by one only of two assignees. It is settled also in *ex parte Peele* (*d*), that the affidavit may be made by one partner; and in *ex parte Blakey* (*c*), by one of several assignees.

Then as to the second objection. There is a material difference between the trading and act of bankruptcy. With respect to the act of bankruptcy all the words in sections 3 and 4 are *prospective;* and, as all acts of bankruptcy are construed strictly, they could not relate to acts previous to the operation of the present statute. But with respect to the trading, the words are different. They relate, not to the persons who *shall* use the trade of, &c., but to persons actually using it. The words are—"All bankers, &c. using the trade," &c.

Mr. *Agar* in reply.

The statute is imperative. The bond must be given by the petitioning creditor, who, in the present case, is

(*a*) 7 *Vin. Abr.* 66.
(*b*) *G. Cooper*, 99; 2 *Rose*, 172; 19 *Ves.* 291.
(*c*) 1 *Gl. & Jam.* 197.
(*d*) *Buck*, 457.

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a feme covert, and incapable of giving a bond. And in the petition which is annexed to the commission it would appear at law, that the debt was due to the wife only, which would not support a commission upon a debt due to the husband and the wife. *Guthrie* v. *Fisk*, 3 *Starkie*, 152; and 3 *Barn. & Cresw.* 185. And with respect to the imagined difference between the clauses relating to the act of bankruptcy, and the clauses relating to the trading, it was nothing but imagination; for the words in the clause relating to the trading are not *had used*, but *using*, which was in effect the same as the words relating to the act of bankruptcy, and must therefore be governed by the case of *Maggs* v. *Hunt*. (*a*)

The Vice-Chancellor.

April 18.

It is clear, that to support a commission the petitioning creditor's debt must be a legal debt; that is, a debt upon which an action might have been brought by the petitioning creditor. Various judges, and Lord *Eldon* among the rest, have adopted the expression, that the commission of bankruptcy is a statute execution; which implies that the petitioning creditor must stand in the situation of a person who could sustain an action at law.

In the case of *Staples* (*b*), where the debt was due to the wife as administratrix, it was held, that the husband alone could not be the petitioning creditor. In the case in *Davies* (*c*), it was held, that where the debt was due to the wife as executrix, her husband alone could not be the petitioning creditor, because, for the purpose of recovering the debt at law, it would be necessary that

(*a*) 4 *Bing.* 212. (*b*) 7 *Vin. Abr.* 66. (*c*) Page 464.

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the husband and wife should join in the action. In *ex parte Barrow* (*a*), where the petitioning creditor was an infant, Lord *Roslin* said, "It must be the bond of the petitioning creditor; the same person who makes the affidavit must likewise give the bond." This being his Lordship's view, and the thing in that case being impossible, the commission was superseded. The application there was to support a commission, by taking the bond from some other person; but Lord *Roslin* held, that such a commission could not stand, because it appeared on the proceedings, that the person who sued out the commission and made the affidavit was incompetent to give the bond. As the same person who makes the affidavit must likewise give the bond, so also the person who makes the affidavit must be the person who is the petitioning creditor; for the words of the act (*b*) are, "That the petitioning creditor shall, before any commission be granted, make an affidavit in writing, &c., and shall likewise give a bond," &c. And in *ex parte Morton* (*c*) the same rule is laid down.

The consequence then is, that both upon authority and principle I must hold, unless there be some decided practice the other way, that where the person who petitions for a commission is a feme covert, inasmuch as a feme covert alone could not maintain an action, inasmuch as she cannot give a bond, having reference both to the language of the statute, and to the doctrine that the person suing out the commission must be a person who can support an action, I am bound to hold, that the present commission cannot be sustained. As to the practice also, I find that there is no precedent whatever to support such a commission. In *ex parte Hodgkinson* (*d*),

(*a*) 5 *Ves.* 554.
(*b*) 6 Geo. 4. c. 16. s. 13.
(*c*) *Buck*, 42.
(*d*) 19 *Ves.* 296.

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Lord *Eldon* stated that an uniform practice had for many years prevailed in the bankrupt office, of issuing commissions on an affidavit sworn, and a bond executed, by one partner alone, on behalf of himself and others; and that such a practice having so long existed must not now be overturned. But there is no practice at all to weigh against that principle which operates against a commission being sued out upon this ground. In the total absence, therefore, of precedent in principle to support this commission, I shall grant the prayer of the petition, and supersede the commission with costs.

Ex parte DE TASTET.—In the matter of LATHAM and PARRY.

Linc. Inn, *Sept.* 17, 1827.

THIS was a petition for liberty to except to the master's taxation of the solicitor's bill. The bill delivered amounted to 369*l.* 16*s.* 4*d.*, which was taxed at 350*l.* 4*s.* 9*d.* Items were allowed, amounting to 44*l.* 11*s.* 8*d.*, for "expenses incurred in endeavours to apprehend the said *Joseph Parry*, and in causing posting bills to be printed and circulated, offering a reward for the apprehension of the said *Joseph Parry*."

Mr. *Sugden* for the petition.

Mr. *Heald* and Mr. *Montagu contra*.

The Lord Chancellor considered the charges to be reasonable, and ordered that they should be allowed.

April 1815. *Ex parte* WARING and *ex parte* INGLIS. — In the matter of BRICKWOOD and Co., and in the matter of BRACKEN and Co. (*a*)

When the holders of bills have a lien upon property deposited with the acceptor.

BRACKEN and Co. were manufacturers in Lancashire. *Brickwood* and Co., bankers in London, were the bankers of *Bracken* and Co. *Bracken* and Co. opened their account with *Brickwood* and Co. upon an agreement that *Bracken* and Co. should deposit with *Brickwood* and Co. such bills of exchange and notes as they, *Bracken* and Co., should receive in the course of their dealings; and should be at liberty to draw upon *Brickwood* and Co., from time to time, as their occasions might require; *Bracken* and Co. always leaving a surplus in the hands of *Brickwood* and Co., and paying a commission to *Brickwood* and Co. on their acceptances. *Bracken* and Co. also deposited with *Brickwood* and Co. some title-deeds of an estate, as a collateral security for any advances made, or to be made, by them. On the 7th of July 1810, a commission of bankruptcy issued against *Brickwood* and Co. At the time of this bankruptcy *Brickwood* and Co. had acceptances outstanding to the amount of 23,600*l.*; they were indebted to *Bracken* and Co. for cash, 6,776*l.*; they held short bills of *Bracken* and Co. to the amount of 23,800*l.*, and the title-deeds of an estate worth 2,961*l.*; so that the account

(*a*) This important case is reported by Mr. *Rose*, in his 2d vol. page 182, and by Mr. *Vesey* in his 19th vol. page 550, but without the arguments of counsel. This report is by Mr. *Montagu*, and was printed in the second number of his annual digest.

between *Bracken* and Co. and *Brickwood* and Co. was as follows :—

Brickwood & Co.	*Dr.* £	s.	d.	*Cr.*	£	s.	d.
Cash -	6,776	0	0	Acceptance -	23,600	0	0
Short bills	23,800	0	0				
Title-deeds	2,961	0	0				

On the 2d of August 1810, a commission of bankruptcy issued against *Bracken* and Co. *Brickwood's* acceptances were proved under both commissions. The bill-holders presented a petition, insisting that they were entitled to have the cash, the short bills, and the produce of the title-deeds, applied in liquidation of their bills.

The assignees of *Bracken* and Co. presented a petition, praying that the assignees of *Brickwood* and Co. should deliver to the assignees of *Bracken* and Co. the short bills, and 2,961*l.*, the produce of the title-deeds, upon the assignees of *Bracken* and Co. indemnifying the assignees of *Brickwood* and Co. against any dividends which they might be liable to pay upon the outstanding acceptances to the amount of 16,824*l.*, the difference between the whole amount of the acceptances and the cash balance.

Mr. *Leach* and Mr. *Cooke*, for the bill-holders, contended that the short bills and securities were in *Brickwood's* hands, not merely for their indemnity, but as a trust, specifically for the payment of the acceptances.

* The argument of Mr. Leach & Mr. Cooke is more fully reported in 3 Ves. 346.

Sir *Samuel Romilly* and Mr. *Trower*, for the assignees of *Brickwood* and Co., wished to act under the direction of the Court.

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Mr. *Fonblanque*, Mr. *Bell*, and Mr. *Montagu*, for the assignees of *Bracken* and Co., contended —

1st. That the bill-holders were not entitled to the preference which they claimed.

2dly. That the short bills and cash ought to be returned to them for the general benefit of all the creditors of *Bracken* and Co., upon the assignees of *Brickwood* and Co. being indemnified against any dividends which they might be obliged to pay to the bill-holders.

The substance of their argument was as follows: —

1st. *The bill-holders are not entitled to the preference which they claim.*

The question is, "Are the bill-holders entitled to a lien upon all or any, and what part, of the property in the possession of *Brickwood* and Co.?"— This property consists of short bills, and of the proceeds of the mortgage.

We say, first, *the bill-holders are not entitled to the proceeds of the short bills.* They have no right, *direct* or *indirect.*

Supposing no bankruptcy to have taken place, it is clear that the bill-holders would not have any *direct* right to such short bills. The short bills are not held by the London bankers in trust for the bill-holders. The very essence of a bill of exchange is, that it is a mere personal undertaking. If the bill is made payable out of a particular fund, it may be a valid order for the payment of money, but it is not a bill of exchange.

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The law upon this subject has been so long and so repeatedly settled, that it is almost unnecessary to cite cases. It will be sufficient to remind the Court that "an order to pay a sum out of rents, or other money, in the hands of the person to whom it is addressed, is no bill;" *Jenny* v. *Herle*, Lord *Raymond*, 1361; so also a promise to pay "on the sale or produce immediately when sold of the White Hart Inn, St. Albans," is no note. *Hill* v. *Halford*, 2 *Bos. & Pull.* 413. In *Row* v. *Dawson*, 1 *Ves.* 331, "Out of the money due to me from *Horace Walpole* out of the Exchequer, and what will be due at Michaelmas, pay to *Tonson*," &c. Lord *Hardwicke* said "This is not a bill of exchange: not to pay generally, but out of a particular fund which creates no personal demand; therefore not a draft or personal credit to go in the common course of negociation, which is necessary to bills of exchange, by draft on the general credit of the person drawing, the drawer, and indorser, without reference to any particular fund." So *Smith* v. *Everett*, 4 *Bro.* 64: "Pay out of the money you may receive of the Treasury on my account, all such bills as I have accepted, and made payable at your house, which I agree to allow in your account," is *not* a bill, but *appropriation of particular fund.* Suppose in this case the bills had expressed that payment should be made out of the short bills and the proceeds of the mortgage, it might have been good appropriation of a particular fund; but the instruments would have been of a different nature; they would not have been, as they now are, bills of exchange. Will the Court imply a condition which, if expressed, would destroy the very instrument on which the claim depends?

The holders claim by virtue of their bills, and upon these bills their claim must depend. "You cannot attach equities upon bills of exchange," the Lord Chancellor

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says in *ex parte Bloxham*, 6 *Ves.* 450; and yet, if the claim of the bill-holders is allowed, there will be a new head of equity hitherto unknown. Suppose, for instance, I hold an acceptance of Messrs. *Childs*'s, am I entitled to a discovery from them what assets they hold of the drawers to meet this bill? If I am entitled, every holder of an acceptance has the same equity. Is not the answer obvious? The acceptance is a mere personal undertaking, and with that personal undertaking the holder must be satisfied.

Again, if the acceptor of a bill hold the notes of the drawer in trust for the holder, the holder will be entitled to a discovery to restrain the negociation of the notes: and the unvaried practice in the mercantile world for bankers to return such bills, if required so to do by their employers, is a breach of trust. But if these equities are to attach upon bills of exchange, why are they to be confined to bankers' bills? — will they not be applicable to every species of bill? for instance, to a bill accepted by a factor, a warehouseman, on account of his principal, and so for every other bill.

The reasoning upon this subject is similar to that contained in *Worral* v. *Harford*, 8 *Ves.* 4., which was a bill filed by the solicitor of a trustee for a lien upon the trust estate for his costs.

To this bill the defendants put in a general demurrer. Mr. *Richards* and Mr. *Hart*, in support of the demurrer, said, this was a perfectly novel attempt; and they represented the mischievous consequences, if all persons employed by trustees, surveyors, &c. might come as creditors upon the fund for an administration, and to have every thing undone; insisting that they must

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look to the trustees who employed them. At least they must state some case; as, that the trustees are insolvent. The LORD CHANCELLOR said, "It is admitted that a bill of this kind is a perfect novelty. It is in the nature of the office of a trustee, whether expressed in the instrument or not, that the trust property shall reimburse him all the charges and expenses incurred in the execution of the trust. That is implied in every such deed. But it would be strange from that implication to conclude, that the persons employed by them are therefore creditors of the trust fund. I doubt very much, and desire not to be understood to admit, that, even if the trustees are charged not to be solvent, those persons may come upon the fund. They can have no better right upon the expression of what would, if not expressed, be implied." Demurrer allowed.

Upon *principle*, therefore, we submit that the bill-holders have not any *direct* lien upon the short bills.

The next consideration is, what *cases* there are upon the point.

The first case is *Maure* v. *Harrison*, 1692, 1. *Eq. Abr.* 93, in which it is said, "A bond creditor shall in this court have the benefit of all counter bonds or collateral securities given by the principal to the surety: as if A. owes B. money, and he and C. are bound for it, and A. gives C. a mortgage or bond to indemnify him: B. shall have the benefit of it to recover his debt."

Upon this note, which is to be found only in this abridgment, and which has not been confirmed by any decision since the year 1692, and which is, as we submit,

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contrary to the principles of equity, it is, perhaps, not saying too much when we add that, in all probability, some circumstance has been omitted. We submit that this case is contrary to one of the established principles of a court of equity, and adopted from a misapplication of a rule of equity, that *a surety is entitled to the benefit of all securities held by the creditor*. He is so entitled because a court of equity regards not the circumstances, but the substance of the contract; and performance of the real contract the court will enforce. When a person consents to become a surety to a creditor who holds securities from the debtor, the substance of the contract cannot be mistaken; the surety's liability is only for the difference between the whole debt and the value of the securities: and if the creditor, instead of resorting in the first instance to the debtor, insist upon payment from the surety, can it be doubted that in equity the surety may insist as against the debtor, upon the benefit of the securities held by the creditor. Upon a misapplication of this rule, this supposed doctrine in *Maure* v. *Harrison* is founded; because *a surety* is entitled to the benefit of all securities held *by the creditor*, it has conversely been supposed that the *creditor* is entitled to the benefit of all securities held by the *surety*; but a moment's consideration of the very principle upon which the rule that "*a surety is entitled to the benefit of all securities held by the creditor*" is founded, will shew that the converse is not law. A court of equity will enforce the real contract made by the parties; but it will not make a new contract for them — it will not make a contract which the parties never made or intended to make. When a surety holds security, the contract between the creditor and his debtor is merely personal; he relies upon the responsibility of the debtor and of his surety. The contract between the debtor and his surety is not merely

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personal; the surety insists upon security of property. What power can a court of equity possess to convert this contract between the creditor and debtor into a contract not merely personal, but a contract for security. For these reasons, as this note is to be found only in this abridgment; as it has not been confirmed by any decision since 1692; and as there is no equity to support it, we submit that it is mistaken law; and even if it is not, it does not apply to the case now before the Court, of bills of exchange thus deposited with a banker. (The LORD CHANCELLOR said, "I have never heard this case relied upon as a governing case at this day.")

The next case where this subject seems to have been agitated, is in *Wright* v. *Morley*, 1805, 11 *Ves.* 12, where Sir *William Grant* is reported to have said, "As the creditor is entitled to the benefit of all the securities the principal debtor has given to his surety, the surety has full as good an equity to the benefit of all the securities the principal gives to the creditor." But if this case be accurately examined, it will appear that there was not any necessity for this dictum; it is used apparently as the foundation of a decision which did not require any such foundation. If it is omitted from the judgment of Sir *William Grant*, the judgment will remain the same. The words are:—"The question then is, whether the Court will act upon that assignment at the instance of the surety, in whose favour it is not made. The surety is the only plaintiff. The annuitant, who has the assignment of the dividends, does not join. At the hearing I thought the plaintiff entitled to the equity he seeks. Afterwards I had some doubt; but I adhere to my first opinion. *I conceive that, as the creditor is entitled to the benefit of all the securities the principal debtor has given to his surety, the surety has full*

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as good an equity to the benefit of all the securities the principal gives to the creditor. There is a very strong instance of the application of that equity in *Parsons* v. *Briddock.* The principal had given bail in an action. Judgment was recovered against the bail. Afterwards the surety was called upon, and paid; and it was held, that he was entitled to an assignment of the judgment against the bail; so that, though the bail were themselves but sureties as between them and the principal debtor, yet, coming in the room of the principal debtor as to the creditor, it was held, that they likewise came in the room of the principal debtor as to the surety. Consequently that decision established that the surety had precisely the same right that the creditor had, and was to stand in his place. The surety had no direct contract or engagement by which the bail were bound to him, but only a claim against them through the medium of the creditor, and was entitled only to all his rights. There are other cases, establishing the same principle, though not quite so strong as that."

Now, the judgment would be as firm by the omission as by the insertion of all this extract, from the word "I conceive" to the word "creditor." It would stand upon the established law of the court: upon settled cases: upon the right of the surety: and there was no necessity for this mistaken analogy to this supposed right of the creditor. For these reasons we submit that, *supposing no bankruptcy* to have taken place, the bill-holders would have no *direct* right to the proceeds of the short bills. — Can it be contended that they are in a better situation by the *bankruptcy?* Must not the rights of all parties be as they were at the moment of the bankruptcy; except, indeed, that if bankruptcy make any difference, it is in favour of the general creditors, amongst whom the

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object of this Court and of the legislature is to promote equality.

Secondly, *the bill-holders are not entitled to the proceeds of the mortgage.* The reasoning is the same as with respect to the bills. They must stand or fall together. For these reasons the bill-holders have no *direct* right to the property.

We submit next, that they have no *indirect* right; but as this may depend upon the rights between the two classes of assignees, it will be necessary to clear the way by shewing that the assignees of *Bracken* and Co. are entitled to the short bills and 2,961*l.*, upon indemnifying the assignees of *Brickwood* and Co. against the payment of any dividends to the bill-holders.

When the *whole amount* of the acceptances is paid, the cases seem free from difficulty. 1. Supposing the whole amount of the acceptances to be paid to the assignees of *Brickwood* and Co., they, of course, must return the short bills. 2. Supposing the whole amount of the acceptances to be paid to the bill-holders, whether by a full payment to them by the assignees of *Bracken* and Co. or by a dividend paid by each estate, the assignees of *Brickwood* and Co. would not have any lien upon the short bills and money beyond the extent of the dividend paid upon the acceptances by the estate of *Brickwood* and Co. For instance, if *Brickwood*'s estate were not to pay any thing, they would not have any lien. If each estate were to pay 10*s.*, the lien of the assignees of *Brickwood* and Co. would not exceed one moiety of their acceptance, or 12,000*l.*: or supposing *Bracken*'s estate to pay 19*s.* in the pound, and *Brickwood*'s 1*s.*, the assignees of *Brickwood* would have a lien only for as many shillings.

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The difficulties arise only *when the whole acceptances cannot be paid:* If the estate of *Bracken* and Co. were to pay 19*s.*, and the estate of *Brickwood* and Co. only 1*s.*, the assignees of *Brickwood* and Co. would have a lien only for the number of shillings which they would pay. If such would be the equity in this case, we submit that it would be the same in all cases. The only right of the assignees of *Brickwood* to retain the short bills and money is the possible injury from the payment of dividends upon their acceptances. If they pay only a partial dividend, their right of lien is limited by the extent of their payment. Ought they then to have a lien upon the whole assets, because they do not pay a farthing? Is it not the justice of the case that, upon indemnifying the assignees of *Brickwood* and Co. against any dividend which they might make upon their acceptances, the short bills and money should be delivered up? Is the estate of *Bracken* and Co. thus to be injured by the detention of their property upon the possibility, without any probability, of the payment of any dividend by the estate of *Brickwood* and Co.?

Such we submit is the right of the assignees of *Bracken* and Co., and such being their right, there is no foundation for any supposed *indirect* right of the bill-holders to this preference.

April 25, 1815.

The LORD CHANCELLOR, after stating the petitions, said,

The relief prayed by the bill-holders is on this alleged ground, that the short bills and the mortgages, (I leave the cash out of the question for a moment,) having been paid into the hands of

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Brickwood and Co. as a security against their acceptances, the holders of such acceptances have an equity to insist that the short bills and the mortgage shall be applied specifically to the purpose of discharging these acceptances, upon the supposition that, in a transaction of this nature, the bill-holders have a right to the benefit of a contract between the party indemnifying and the party indemnified, although no parties themselves to the contract; or, in other words, that they who have contracted out of these deposits to pay certain debts, are liable in equity to the demands of the persons to whom payment is to be made; and there is a case in equity which goes this length. It will be sufficient for me to say, that supposing a commission not to have issued, I do not see any thing in this transaction, between persons thus dealing with their bankers, and making a deposit of this sort, which would entitle the creditors to say that they have an equity attaching on these effects; that is to say, that the moment a pledge is put into the hands of the banker, he becomes a surety for them to whom his acceptances are delivered. If there were such an equity, the consequence must be, that the banker and the person whose depositary he is could come to no new arrangement without the consent of the creditors. It is enough for me to say, that the petition cannot be supported upon this ground. Whether there is any other ground upon which it may be supported, will depend upon the view which I have taken of this case, and the opinion which I have formed, after much thought, although not with much confidence. My view is this: — On the 7th of July 1810 *Brickwood* and Co. became bankrupts. *Bracken* and Co. remained out of a state of bankruptcy until the 2d day of August 1810. The first question then is, "What was the nature of the demand which

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Bracken and Co. had on *Brickwood* and Co. from the 7th of July to the 2d of August. Now it is impossible to deny that, if *Bracken* and Co. had relieved *Brickwood* and Co. from their acceptances, the short bills and the mortgage must have been restored to *Bracken* and Co. On the other hand, I take it to be equally clear that *Bracken* and Co. never could have any demand on the estate of *Brickwood* and Co. for the short bills and mortgage, without bringing into the estate of *Brickwood* and Co. funds equal to the claim which *Brickwood* and Co. had on the short bills and the deeds, not for the security of the bill-holders, but from the relative situations of *Bracken* and Co. and *Brickwood* and Co.

The next question is, whether the nature of the case is in any and what respect altered by the bankruptcy? I cannot discover any difference. It appears to me that the assignees of *Bracken* and Co. are bound to leave the estate of *Brickwood* and Co. in the same situation as *Bracken* and Co. were themselves bound before the bankruptcy.

On the best consideration I have been able to give to the question, with reference to the rights of all the creditors under the commission, and with regard to the bankrupts themselves, it does appear to me, that in this circuitous way the persons holding the acceptances must be paid, not because they are demands, but because it is the true way of clearing the estates. I do not know that I am clearly stating what I mean, but I think the principle on which I go is right; and which brings me back to the opinion of Mr. Cook, *on a former occasion expressed by him, though, at that time, somewhat different from mine. After this, perhaps, you will have no great difficulty*

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in drawing out minutes that will apply to these different petitions. (a)

An order was made, by which the payment was made to the bill-holders. (*b*)

(*a*) In *ex parte Parr*, 1818, Sir *J. Leach* says, "The whole equity in *ex parte Waring* consists in the short bills being specific property in the hands of *Brickwood*'s assignees to satisfy the acceptances."

(*b*) Mr. *Montagu* has added the following queries: —

Query 1. What is meant by the conclusion of the Lord Chancellor's judgment, as printed in italics?

Query 2. *Were not the short bills in the reputed ownership of* Brickwood *and Co., except as far as they were clothed with a trust, from the relation of banker and correspondent?*

Query 3. Was it not the nature of this trust, that the short bills should not be returned to *Bracken* and Co. until provision was made by them for *Brickwood*'s acceptances?

Query 4. Were not all the creditors of *Brickwood* and Co. entitled to the proceeds? and were not the assignees of both estates entitled to an order that the produce of the short bills should be applied to the general funds under *Brickwood*'s estate, and that any surplus should be paid to the assignees of *Bracken* and Co., for the benefit of their general creditors?

See the order noted in this case
Powles v Hargreaves 3 De G.
Mac. & G. 445. note (b).

DIGESTED INDEX

OF THE

CASES IN THIS VOLUME,

And of the

CONTEMPORANEOUS CASES

DECIDED IN THE COURTS OF LAW.

ACT OF BANKRUPTCY.

See COMMISSION, 4. RELATION.

1. Lying in prison two months, although the party has the benefit of day rules, is equally an act of bankruptcy; the principle of the act being, that it is evidence of insolvency. *Soames* v. *Watts*, 1 Carr. (N.P.) 401.

2. A creditor has a right to call on his debtor where he pleases: Held therefore, that a denial to a creditor at a place not the bankrupt's usual place of business is equally an act of bankruptcy. *Park* v. *Prosser*, 1 Carr. (N.P.) 176.

3. Depositions taken before commissioners of bankrupt, stating that a trader promised to meet one of his creditors at the office of his solicitors, in order to give him security for a debt, but that he did not attend the appointment, but altogether absented himself, are not of themselves sufficient evidence of the commission of an act of bankruptcy under the statute 49 G. 3. c. 121. s. 10., as it was not stated that he absented himself with an intent to delay such creditor. *Toleman* and another, assignees of *Tucker*, a bankrupt, v. *Jones*, 9 Moore, 24.

4. A lease contained a proviso for re-entry of the lessor, and that the lease should be void on the lessee's assigning without the licence of the lessor. The lessee, in January 1825, executed a deed, which purported to convey all his real and personal property to trustees for the benefit of his creditors. In April 1825, a commission of bankruptcy issued against the lessee, and he was duly declared a bankrupt: Held, that the deed of January 1825 was an act of bankruptcy, and void; that it did not operate as a valid assignment of the tenant's interest in the lease, and therefore that there was no forfeiture. *Doe*, on the demise of *Ann Lloyd*, v. *Powell* and others, assignees of *Thomas Lloyd*, a bankrupt, 5 Barn. & Cress. 308.

5. An act of bankruptcy, previous to the first of September 1825, will not support a commission issued since that time. *Maggs* v. *Hunt*, 4 Bing. 212.

6. In order to prove the act of bankruptcy, in support of a joint commission, the petitioning creditor under a previous separate commission may be compelled to exhibit the proceedings under such separate commission. Ex parte *Harrison*, in the matter of *Groves* and *Littel*, 2 Gl. & Jam. 135.

7. Quære, whether the act of bankruptcy, by lying in prison twenty-one days, under the statute 6 Geo. 4. c. 16. s. 5., have relation back to the first day of imprisonment. *Tucker*, assignee of *Hickman*, v. *Barrow*, 1 Mood. & Malk. 137.

ACTION.

See ASSIGNEES, 6. MESSENGER, 4.

1. In the case of an action for money had and received, brought by a petitioning creditor and another assignee of a bankrupt against a sheriff, for the amount of money levied by *fieri facias* on the bankrupt's estate, where the proof of the petitioning creditor's debt was merely the single *primâ facie* evidence of the acceptance of a bill of exchange by the bankrupt, before the bankruptcy, unfortified by any proof of consideration (there having been a notice given that the plaintiff would be required to prove the consideration), and where the parties were connected by relationship, and did not appear to be connected in business, and where there were circumstances of suspicion surrounding the transaction (for the nature and extent of which see the case): It was held to be a question for the jury, on the whole matter, to pronounce the debt collusive, or *bonâ fide*, notwithstanding no direct evidence was given or offered to impeach the acceptances: and on this principle, where there are circumstances of suspicion, and the plaintiff has notice that he will be required to prove consideration, although generally the plaintiff is not under any necessity to prove the consideration, unless it be impeached, yet, in a case where the jury have a right to require, from the aspect of the whole transaction, something to corroborate the *primâ facie* case of proof of hand-writing to the acceptance, if the plaintiff choose so to hazard his success as to rest his case there, he must abide the result; and the jury may decide against the document, because the suspicion alone leaves the question of fact open to them. *Abraham* and another, assignees of *Jacobs*, a bankrupt, v. *George* and another, sheriff of Bristol, 11 Price, 423.

2. K., the owner of furniture, lent it to plaintiff under the terms of a written agreement; plaintiff placed it in a house occupied by the wife of C. a bankrupt; C.'s assignees having seized the furniture: Held, that plaintiff might recover it in trover without producing the agreement. *Burton* v. *Hughes* and others, 2 Bing. 173.

3. In an action, by the assignees of a bankrupt, it was referred to an arbitrator, to take accounts between the parties, with liberty to him to state, on the face of his award, any point of law that either party might require. The arbitrator, by his award, found the following facts:—The defendant, before the bankruptcy, had accepted bills drawn upon him by the

bankrupt; these bills had been paid away to creditors of the bankrupt. At the time of his accepting the bills, the defendant, as the agent of the bankrupt, had in his hands money of the bankrupt to the full amount of the sum for which the bills were drawn, and these funds had not been withdrawn at the time of the bankruptcy. After the bills became due respectively, and before the act of bankruptcy, the holders of the bills, in order to relieve the defendant from his responsibility to them, took from the defendant a composition upon the acceptances, and delivered up the bills to the defendant; but the bankrupt was not a party to this arrangement. The award then stated, that in taking the accounts between the parties, the arbitrator had not allowed the amount of the sums for which the bills were drawn to be set off by the defendant, but only the amount of the composition. Held, that the defendant was entitled to have the full amount of the bills allowed him in account. *Stonehouse*, assignee of *Harrison*, a bankrupt, against *Read*, 3 Barn. & Cres. 669.

4. A trustee under the 54 G. 3. c. 137. (Scotch Bankrupt Act) cannot sue in his own name for a chose in action. *Jeffery* v. *M'Taggart*, 6 Maul. & Selw. 126.

5. Where the assignees of the bankrupt brought trover for goods in his order and disposition at the time of his bankruptcy: Held, that no demand and refusal were necessary to support the action. *Soame* v. *Watts*, 1 Carr. (N.P.) 400.

6. Where the bankrupt had advanced money on bills, which, after an act of bankruptcy, he had sent to the defendants: Held, that the assignees might maintain trover for them, the bankrupts having a lien on them, which passed to the assignees, and enabled them to recover the bills from a wrong-doer. *Hall* v. *Barnard*, 1 Carr. (N.P.) 382.

7. Where a verdict is found for the plaintiff in an action by assignees, on a contract entered into with a bankrupt before his bankruptcy, it is no ground for setting aside the verdict, that it did not appear that 100*l.* of the petitioning creditor's debt was contracted within six years before the suing out of the commission. *Mavor*, assignee of *W. H. Pyne*, v. *Pyne*, 3 Bing. 285.

8. Where the sheriff, having paid over the proceeds of goods taken under a *fi. fa.* against I. A., was sued in trover by the assignees of I. A. under a commission of bankrupt, and gave notice to the creditor to defend the action, and upon his refusal, let judgment go by default, and paid over the value of the goods to the assignees. Held, that the sheriff was not bound to defend the action, but might recover against the creditor the money paid him, upon proving the validity of the bankruptcy. *Austen*, sheriff of Kent, v. *Ward*, 1 Ry. & Mood. 116.

9. A., on the 18th of March 1824, paid into the Totness country bank a quantity of notes of a bank at Dartmouth, to bear interest from that day. The Totness bankers sent the notes early on the following morning to the Dartmouth bank. Upon the receipt of them there, the latter, according to their usual course of dealing with the Totness bankers, gave them credit in account for the amount of the notes. The course of business between the two banks was, that if the Totness bank received notes of the Dartmouth bank in the course of the day, they sent the notes on the following morning to the Dartmouth bank. If the Dartmouth bank received the notes of the Totness bank,

they at the close of the business of the day sent them to the Totness bank. If the balance of the day was in favour of either bank, the amount was paid by a bill upon their respective agents in London. The Dartmouth bank continued to pay their notes until the evening of the 19th. Held, that as between A. and the Totness bankers, the taking of credit in account for the amount of the Dartmouth notes was equivalent to payment to the Totness bankers, and therefore, that A. was entitled to recover the amount from them. *Gillard* v. *Wise* and others, 5 Barn. & Cres. 134.

10. It was agreed between A., resident in London, and B., who resided in the West Indies, that the former should accept bills drawn upon him by B. to a specified amount, upon A.'s having bills of lading filled up to his order for coffee, sugar, cotton, and rum, and that after deducting his (A.'s) advances, charges, and commission, the balance was to be paid to C., who was a merchant resident in London, and for whom B. acted as agent in the West Indies. B. shipped goods with a bill of lading filled up to A.'s order. At the time when the goods arrived C. had become bankrupt. A. demanded the goods, but the captain having wrongfully refused to deliver them, he brought trover against the captain. Before any assignees were chosen under C.'s commission the cause was referred to arbitrators; but they not having made any award, the cause was tried, and A. recovered the proceeds of the goods. The assignees of C. having brought assumpsit for money had and received to recover the proceeds of the goods: It was held, that A. was authorised by the bill of lading to act for the benefit of all concerned, and to do all that was necessary to obtain possession of the goods; and there being nothing to shew that a reference was an improper step, it was held that A. was entitled to deduct the costs of the reference as well as of the cause. *Curtis* and another, assignees of *George Laing*, a bankrupt, against *David Barclay*, 5 Barn. & Cres. 141.

11. Possession under a general bailment is sufficient to entitle a party to maintain trover against a stranger. Where, therefore, the owner of furniture let it to the plaintiff on hire, under the terms of a written agreement, and he placed it in a house occupied by the wife of a person who had become bankrupt, and it was seized by order of the assignees: Held, that the plaintiff might recover in an action of trover without producing the agreement, although it was insisted that he had a mere qualified interest, which could not be proved without the production of that instrument. *Burton* v. *Hughes* and others, 9 Moore, 334.

12. A party who purchases goods under a distress irregularly conducted, has a sufficient title to maintain trover. *Lyon* v. *Weldon* and others, 2 Bing. 334.

ADVERTISEMENT OF ADJUDICATION.

The advertisement of the adjudication in the Gazette will not be stayed upon an adverse application by the bankrupt, unless upon the proceedings there is a clear defect in the requisites to support the commission. Ex parte *Ainsworth*, in the matter of *Ainsworth*, 2 Gl. & Jam. 89.

AFFIDAVIT.

See COMMISSION, 2. PRACTICE, 3. 17.

1. An affidavit of the bankrupt, for the assignees, is not sufficient to hold to bail. *Tucker* v. *Francis*, 4 Bing. 142.

2. Whether an affidavit, sworn before the petition was actually filed, will support an indictment for perjury, quære. *Rex* v. *Dudman*, 2 Gl. & Jam. 389.

3. Mode of proceeding upon irrelevant or scandalous affidavits. See ex parte *Chisman*, in the matter of *Rodel*, 2 Gl. & Jam. 315.

ALIENATION.

See RESTRAINT of ALIENATION.

ALLOWANCE.

1. The right to the allowance vests, not on the bankrupt's obtaining his certificate, but upon the payment of the sufficient dividend; and the representatives of the bankrupt are entitled to the allowance, whether it does or does not vest during his life. Ex parte *Safford*, in the matter of *Safford*, 2 Gl. & Jam. 128.

2. The bankrupt is not entitled to his allowance, unless a sufficient dividend be paid on the joint and on the separate estate. Ex parte *Goodall*, in the matter of *Goodall* and *Turner*, 2 Gl. & Jam. 281.

3. The bankrupt has no right to his allowance, until his certificate shall have been confirmed by the Chancellor. Ex parte *Pavey* in the matter of *Pavey*, 2 Gl. and Jam. 358.

4. Whether the allowance is payable where the net produce is only ten shillings in the pound, quære. Ibid. ibid.

AMENDMENT of COMMISSION.

See PRACTICE, 6.

Commission amended, upon motion, by the alteration of an *i* into an *e* in the bankrupt's name. Ex parte *Harman*, in the matter of *Niven*, 2 Gl. & Jam. 25.

ANNUITY.

See CERTIFICATE, 5. 9. RESTRAINT OF ALIENATION, 1.

1. The state of the money market is not a circumstance which can affect the rule in bankruptcy, as to the computation of the value of an annuity. Ex parte *Webb*, in the matter of *Burraston*, 2 Gl. & Jam. 29.

2. Where the agent between the grantor and the grantee of an annuity contrived, under colour of an annuity, to obtain the purchaser's money in payment of a debt due from the grantor to the agent, — and the purchaser, after the bankruptcy of the agent, and with full knowledge of all the circumstances of the case, commenced an action against the agent for negligent conduct in the purchase of the annuity, the action was held to be such an election to adopt the annuity as to defeat the right of proof under

the commission. Ex parte *Shaw*, in the matter of *Howard* and *Gibbs*, 2 Gl. & Jam. 106.

3. In valuing an annuity, the commissioners cannot, since the 6 Geo. 4. c. 16. s. 54., enter into the consideration of the altered health of the grantee, but in estimating the value of property which is the consideration of the annuity, they are not limited to the price paid for it by the grantee, but should consider the actual value, at the time of the sale to the grantor, if from any cause there have been an alteration in the value. Ex parte *Fisher*, in the matter of *Bradley*, 2 Gl. & Jam. 102.

4. A covenant by the husband to secure to his wife an annuity, during her life, in case she should survive him, is a sufficient consideration to support the grant of an annuity by the wife's father. Ex parte *Draycott*, in the matter of *Archer*, 2 Gl. & Jam. 283.

APPRENTICE FEE.

Where the agreement of apprenticeship is concluded, and the apprentice fee is paid, and the apprentice is actually serving under the agreement, and the execution of the indentures has not taken place from mere inattention, the father is entitled to a return of part of the fee, under 6 Geo. 4. c. 16. s. 49. Ex parte *Haynes*, in the matter of *Donkin*, 2 Gl. & Jam. 122.

ARREST.

See PRIVILEGE FROM ARREST.

ASSIGNEES.

See ELECTION BY ASSIGNEES. JURISDICTION, 1, 5. MESSENGER, 1. PETITIONING CREDITOR, 5. PRACTICE, 15.

1. If a trustee for the benefit of creditors of the bankrupt's property be elected an assignee, he will, if necessary, be removed, for the purpose of taking the accounts. Ex parte *Archer*, in the matter of *Archer*, 2 Gl. & Jam. 113.

2. When one of two assignees signed checks for the dividends, and delivered them to his co-assignee, who undertook to sign and distribute them to the creditors, and the checks, after having been signed by such co-assignee, were deposited in a desk, from which they were fraudulently taken by a clerk, who obtained payment from the bankers, and the assignee so depositing them became bankrupt, the solvent assignee is not liable to the creditors. Ex parte *Griffin*, in the matter of *Dixon*, 2 Gl. & Jam. 114.

3. Whether assignees can enforce the right to damages, in respect of a tort done to a bankrupt's property before the bankruptcy, quære. Ex parte *Bourne*, 2 Gl. & Jam. 147.

4. The creditors of a bankrupt appoint the Bank of England as the place where the estate shall be deposited: a dividend is declared: two of the three assignees sign drafts for the dividends, which they forward to the other assignee for his signature. He also signs them, and receives the money, which he applies for his own purposes. Upon his death, a creditor's suit is instituted by the assignees and the commissioners for the administration of his assets. Held, that the estate of the assignee was not liable, under the statute, to pay

20 per cent. upon the funds misapplied. *Wackerbath* v. *Powell*, 2 Gl. & Jam. 151.

5. Upon a bill filed before the bankruptcy of the plaintiff, supplemental bill may be filed without the consent of creditors. *Bevan* v. *Lewis*, 2 Gl. and Jam. 245.

6. Where, in an action of assumpsit, the declaration stated that the defendant was indebted to the plaintiff, as assignee of I. S., a bankrupt, for goods sold and delivered to the defendant, and monies lent and advanced to him, and on an account stated between him and the plaintiff, as such assignees; and it was proved that the goods had in fact been sold by the bankrupt to the defendant, with the concurrence of, and for the benefit of two former assignees, whose appointment was afterwards ordered to be vacated by the Lord Chancellor, and the plaintiff was thereby appointed a new assignee in their stead: Held, that the action was properly brought, and the declaration well framed; although it was objected, either that the former assignees should have been made parties, or the fact of their having been removed, and the plaintiff substituted in their place, and that the sale was made previously to his appointment, should have been stated in the declaration. *Aldritt*, assignee of *Skarratt* v. *Kittridge*, 8 Moore, 372.

7. In order to charge the assignees with 20 per cent. on balances retained under 49 Geo. 3. c. 121. s. 4. *semble* the commissioners must have settled an account, and charged the defendant with such interest; and being in the nature of a penalty, must be declared for specially, and is not recoverable on the common interest count. *Beresford* v. *Birch*, 1 Carr. (N.P.) 373. See *Election*.

8. If a sheriff's officer seize under a *fi. fa.* goods of a trader more than sufficient to satisfy the levy, and the trader become bankrupt, and the assignees authorize the officer to deliver the whole of the goods to a purchaser, and to receive payment from him, — and the officer does not pay over the residue to the assignees after satisfying the execution, the sheriff is not liable to the assignees. *Cork* v. *Palmer*, 6 Barn. & Cresw. 739.

9. A notice to the assignees of intention to dispute the bankruptcy, without a particular specification whether the trading, petitioning creditor's debt, or act of bankruptcy, is to be disputed, is too general. *Trimley* v. *Unwin*, 6 Barn. & Cresw. 537.

10. When no notice is given to dispute the commission, no evidence is necessary to prove the requisites in support; and if, upon the production of the proceedings, nothing appears to shew a sufficient petitioning creditor's debt, or to shew that such debt does not exist, it is of no importance. *Macbeath* v. *Coates*, 4 Bing. 54.

11. If, in an action by the executor of a creditor, for the recovery of a debt, the defendant give in evidence a commission of bankruptcy against the testator, and a receipt by the assignees for the debt, it seems that such evidence is sufficient to discharge him; but if, instead of relying upon this evidence, he attempts to prove the validity of the commission, and fails, it is not sufficient. *Smith* v. *Evans*, 2 Moore, 474.

12. The declarations of a party suing as assignee of a bankrupt, made before he became assignee, are not admissible as evidence against him. *Fenwick*, assignee of *Devey*, v. *Thornton*, 1 Mood. & Malk. 51.

13. In an action by or against assignees, notice to dispute the bank-

ruptcy, left at the counting-house of the party with his clerk, is sufficient to exclude proceedings from being evidence, under 49 Geo. 3. c. 12. s. 10.; personal service on the assignee is not necessary. *Widger* v. *Browning*, 1 Mood. & Malk. 27.

14. The object of sect. 92 of 6 Geo. 4. c. 16. is to enable the assignees to recover in every case in which the bankrupt, if solvent, might sue, when this recovery can be without prejudice to the bankrupt. *Earith* v. *Schroder*, 1 Mood. & Malk. 24.

ASSIGNEES' ACCOUNTS.

The Court has jurisdiction to review the quantum allowed by the commissioners to the assignees in passing their accounts; and the jurisdiction is not confined to the principle upon which the allowance is made. Ex parte *Anthony*, in the matter of *Richards*, 2 Gl. & Jam. 55. Overruled on appeal, ibid. 177.

ASSIGNEE OF A DEBT.

See CERTIFICATE, 1.

ASSIGNMENT.

See EVIDENCE, 6. LEASE.

The production of the assignment to the plaintiffs, duly enrolled, is sufficient, without proof of its execution; unless notice have been given that it is to be disputed. *Tucker*, assignee of *Hickman*, v. *Barrow*, 1 Mood. & Malk. 137.

ATTESTATION.

1. The authentication, by the solicitor, of the petitioner's signature, is not an attestation within the meaning of the general order of 12th of August 1809. Ex parte *Dumbell*, in the matter of *Dumbell*, 2 Gl. & Jam. 121.

2. A petition which, upon the face of it, does not appear to be by a solicitor, must be properly attested. Ex parte *Cole*, in the matter of *Hole*, 2 Gl. & Jam. 269.

AUTHENTICATION.

See ATTESTATION, 1.

ARBITRATION.

See ACTION, 10.

BANKERS.

See PAYMENTS.

BANKRUPT.

See COSTS, 4. SURRENDER. TRUSTEE. WITNESS.

1. A bankrupt retaining possession of a cottage and land, which passed to the assignees by the bargain and sale under the commission, and which the assignees had contracted to sell, ordered to deliver up possession within fourteen days after personal service of the order. Ex parte *Hargraves*, in the matter of *Blackburn*, 2 Gl. & Jam. 59.

2. Where a trader had assigned his property in trust for the benefit of his creditors, and after the property had been sold under a commission issued against the trader, under which the trustee and another person were assignees; and where it appeared that upon the trustee duly accounting for the trust property, there would be a surplus, — the bankrupt was, upon an indemnity, permitted to proceed against the trustee in the name of the other assignee. Ex parte *Archer*, in the matter of *Archer*, 2 Gl. & Jam. 110.

3. A bankrupt cannot, after he has obtained his certificate, petition to supersede, because he was not a trader. Ex parte *Lewis*, in the matter of *Lewis*, 2 Gl. & Jam. 208.

4. A bankrupt who is disputing the commission at law cannot, although nonsuited, be compelled to convey. Ex parte *Thomas*, in the matter of *Turbervile*, 2 Gl. & Jam. 278.

5. The bankrupt is not entitled to his allowance, unless a sufficient dividend have been paid upon the joint and upon the separate estate. Ex parte *Goodall*, in the matter of *Goodall* and *Turner*, 2 Gl. & Jam. 281.

6. The bankrupt has no right to his allowance, until his certificate shall have been confirmed by the Chancellor. Ex parte *Pavey*, in the matter of *Pavey*, 2 Gl. & Jam. 358.

7. Where, on a prisoner's being brought up to be discharged under the Lords' act, it appeared that a commission of bankrupt had been issued against him since his arrest and imprisonment, and that he had not passed his final examination, the Court ordered him to be remanded until such examination had taken place; and on being afterwards brought up, and it appearing that he had passed it to the satisfaction of the commissioners, he was ordered to be discharged, on inserting an assignment in his schedule to the plaintiff of all his estate, title, and interest in the property therein mentioned, subject to the commission, and the payment or satisfaction of his debts under it. *Numsey* v. *Hall*, prisoner, 8 Moore, 423.

8. On an indictment against a bankrupt for concealing his effects (under 1 G. 4. c. 115. s. 30.): Held, that it might be laid in Middlesex, if the prosecutor could prove an actual concealment there: Held also, that a book delivered up at his last examination, with other papers, on his signing a declaration that they contained a full and true disclosure and discovery of all his estate and effects, was necessary to be produced as part of the prosecutor's case. *R.* v. *Evans*, 1 Ry. & M. 70.

9. Where a commission of bankrupt issued against a person then in custody at the suit of the petitioning creditor, and who afterwards applied to the Court of K. B., and obtained his discharge under the 49 G. 3. c. 121. s. 14., on the ground that he had become bankrupt, and that his detaining creditor had proved under the commission: Held, that he could not, in an action against the assig-

nees, dispute the validity of the commission. *Watson* v. *Wace* and others, 5 Barn. & Cres. 153.

10. An affidavit by the bankrupt, for the assignees, is not sufficient to hold to bail. *Tucker* v. *Francis*, 4 Bing. 142.

11. When the bankrupt acquiesces, the Lord Chancellor will, upon petition, restrain him from disputing his commission at law. Ex parte *Leigh*, in the matter of *Claughton*, 2 Gl. & Jam. 382.

12. In an action on a bill of exchange, accepted for the accommodation of the drawer, who has become bankrupt and obtained his certificate, the bankrupt, having released his assignees, is a competent witness for the acceptor. *Ashton* v. *Longes*, 1 Mood. & Malk. 127.

BILL OF COSTS.

See TAXATION.

BILL IN EQUITY.

See JURISDICTION.

BRICKMAKING.

A devisee for life, who converts the soil into bricks, is not a trader. Ex parte *Burgess*, in the matter of *Burgess*, 2 *Gl. & Jam.* 183.

CERTIFICATE.

See BANKRUPT, 3. COSTS, 4. 6. SEQUESTRATION.

1. A creditor having proved a debt, and afterwards sold and assigned it, may sign the bankrupt's certificate, after such assignment, without the consent of the assignee. Ex parte *Herbert*, in the matter of *Herbert*, 2 Gl. & Jam. 66, overruling ex parte *Herbert*, 1 Gl. & Jam. 399.

2. If there be any formal defect in the signature of the creditors to the certificate, the court may relax the general order of August 8, 1809; but the commissioners ought not to sign without the sanction of the Court. In re *Davis*, 2 Gl. & Jam. 80.

3. A certificate, obtained under an Irish bankruptcy statute (11 and 12 G. 3.), is not pleadable to an action for a debt contracted in England before the commission issued. *Shallcross* v. *Dysart*, 2 Gl. & Jam. 87.

4. The right to the allowance vests, not upon the bankrupt obtaining his certificate, but upon the payment of the sufficient dividend. Ex parte *Safford*, in the matter of *Safford*, 2 Gl. & Jam. 128.

5. Upon error brought to reverse a judgment of the Court of King's Bench for the plaintiff (below), on demurrer to pleas of bankruptcy and certificate obtained, it was held, that an action of debt, brought on an indemnity bond, by a surety, under covenant in a deed for the payment of an annuity, against his principal, for money paid by the surety for arrears of the annuity which had grown due, and for the re-purchase of the annuity redeemed by him after the grantor had become bankrupt, and after the issuing of the commission, but before any dividend had been made, was not barred by the certi-

ficate of the bankrupt, although the grantee of the annuity had proved as a debt against the bankrupt's estate under the commission, for the arrears due at the time of the issuing of the commission, and the value of the annuity under the 17th section of the statute 49 Geo. 3. c. 121. The reasons on which that determination was founded are — that the surety is not, under such circumstances, enabled, within the 8th section of the statute, to prove for the subsequent future payments to be thereafter made, and for which he would be still thereafter liable as damages in an action upon his covenant, or for the value of the annuity made redeemable by him as a debt, which can be said to be due from the bankrupt grantor to him, and for which he (the surety) was liable at the time after the issuing of the commission against the principal.

Proof for the value of the annuity by the annuity creditor, under the 17th section of the statute, does not discharge the sureties of the grantor from their liability to the grantee, as being an election under the 14th section. The surety is therefore entitled to sue the grantor on the bond for indemnifying him, notwithstanding he hath obtained his certificate, for money paid by such surety, at any time after the grantor's bankruptcy, in discharge of the annuity, whether by payment of the arrears subsequently accruing due, or by the redemption of the annuity; and the grantor cannot plead his bankruptcy and certificate in bar of such an action; but the certificate is a bar to an action for the money paid by the surety for the arrears due at the time of the bankruptcy. *Watkins*, Gent. v. *Flannagan*, Esq., 13 Price, 24.

6. Where the bankrupt, after the issuing of a commission against him, but before obtaining his certificate, promised a creditor, who had not proved under the commission, to pay him the whole of his demand, notwithstanding the bankruptcy, and indorsed a bill of exchange to him for that purpose: Held, that the certificate was no bar to an action brought on the bill, the debt due before the bankruptcy being a good consideration for the promise, and which would have been available, even if made after the certificate had been obtained. *Brise* v. *Braham*, 8 Moore, 261.

7. Where a bond was given under the statute 4 Geo. 3. c. 33. s. 1., by a member of Parliament, being a trader, and two sureties, and judgment was obtained in the suit in which the bond was given, after the bankruptcy, but before certificate: Held, that the bankruptcy and certificate were no discharge to the bond. *Campbell* v. *Jameson* and another, 8 Moore, 281.

8. Where a person, who has become bankrupt, is sued for a cause of action accruing before his bankruptcy, and pending the suit, and before trial, obtains his certificate, he must plead it *puis darrein continuance*; and, if he neglect to do so, and judgment be obtained against him, he cannot plead his certificate to an action on such judgment. *Todd* and others v. *Maxfield*, 6 Barn. & Cres. 105.

9. Where one of three co-sureties for the payment of an annuity pay money on account of the annuity after the bankruptcy of a co-surety, his certificate is not a bar to an action for contribution. *Brown* v. *Lee*, 6 Barn. & Cres. 689.

10. The certificate ought not to be signed by creditors before the bankrupt has passed his last examination. Ex parte *Cusse*, in the matter of *Boor*, 2 Gl. & Jam. 327.

11. A loss by gaming invalidates a certificate, although the bankrupt

on the same day wins more than the sum lost. The Chancellor will, without an issue, decide the fact of gaming where it is not disputed. Ex parte *Newman*, in the matter of *Jones*, 2 Gl. & Jam. 329.

CERTIFICATE OF TAXATION.

See TAXATION.

CLAIM.

A partner cannot claim against the separate estate of his co-partner before payment of the joint debts. Ex parte *Carter* and ex parte *Gibson*, in the matter of *Minchin*, 2 *Gl. & Jam.* 233. Ex parte *Ellis*, in the matter of *Badnall*, 2 Gl. & Jam. 312.

COMMISSION.

See DESCRIPTION. PETITIONING CREDITOR, 4. PETITIONING CREDITOR'S DEBT, 2.

1. It is not necessary, in the affidavit made upon striking a docket, to state the consideration of the debt. Ex parte *Harman*, in the matter of *Niven*, 2 Gl. & Jam. 26.

2. It is not a valid ground of objection to the docket papers, that the affidavit of debt, on striking the docket, was sworn before the solicitor suing out the commission. In the matter of *Elford* and Co. 2 Gl. & Jam. 65. In the matter of *Whittle*, ibid. in note.

3. Although a commission be a matter of right, the Chancellor will restrain its use to equitable purposes. Ex parte *Bourne*, in the matter of *Bourne*, 2 Gl. & Jam. 146.

4. A docket struck without an act of bankruptcy, upon the belief by the creditor that an act of bankruptcy had been committed, will support a commission upon a subsequent act. Ex parte *Webster*, ex parte *Stonehouse*, in the matter of *Gregory*, 2 Gl. & Jam. 252.

5. The defendant had become bankrupt thrice, and had not paid 15*s.* in the pound to his creditors under the second commission: Held, that the third commission was not therefore void, but voidable only. *Todd* and others v. *Thomas Maxfield*, 3 Barn. & Cres. 222.

6. A creditor of a bankrupt residing in England having, upon sentences obtained since the bankruptcy, proceeded by process from the courts in Scotland to recover sums due to the bankrupt's estate there, to an amount much beyond his own debt, was, upon evidence of his intention to quit the kingdom, restrained by writ of *ne exeat regno*. *Mackintosh* v. *Ogilvie*, 3 Swan. 365.

7. What is the bankrupt's commission. See ex parte *Gane*, in the matter of *Keel*, 2 Gl. & Jam. 318.

8. Whether a commission can be superseded as to one of two bankrupts, in order to give validity to a subsequent commission against the other with a third. Ex parte *Burlton*, in the matter of *Coleman* and others, 2 Gl. & Jam. 344.

COMMISSIONERS.

See COMMITMENT. TAXATION, 1, 3. CERTIFICATE, 2, PRACTICE, 6, 7.

1. Where two or more commissions against the same person are directed to the same list of commissioners, they are bound to proceed under each commission. Ex parte *Pryce*, in the matter of *Cruso*, 2 Gl. & Jam. 161.

2. The commissioners may expunge the debt of the petitioning creditor. Ex parte *Neal*. Ex parte *Sides*, in the matter of *Dawes*, 2 Gl. & Jam. 308.

COMMITMENT.

1. If a bankrupt be committed without a protection, a detainer may be lodged against him by the assignee, between the time of applying to be re-examined and his examination. Ex parte *Weight*, in the matter of *Weight*, 2 Gl. & Jam. 202.

2. A warrant, stating that various questions had been proposed, "and among others the following" is defective. *Lawrence*'s case, 2 Gl. & Jam. 209.

3. A warrant is defective which refers to documents in a former examination, without setting them forth, so as to enable the judge to decide upon the same information as the commissioners possessed. *Price*'s case, 2 Gl. & Jam. 211.

4. A warrant is defective which refers to, without setting out, previous examinations, and without which the Court cannot judge of the sufficiency of what appears. *Hooton*'s case, 2 Gl. & Jam. 215.

5. A commitment is defective, if the commissioners do not examine with sufficient minuteness. Ibid.

6. The omission to set out a previous examination does not vitiate a commitment upon a distinct ground. *Atkinson*'s case, 2 Gl. & Jam. 218.

COMPOUNDING.

See JURISDICTION, 6, 7. PETITIONING CREDITOR, 3.

CONTINGENT DEBT.

If a defendant become bankrupt, and obtain his certificate between verdict and judgment, the costs are not a contingent debt. *Biré* v. *Moreau*, 4 Bing. 58.

CONTRABAND GOODS.

See PROOF, 14.

CONVEYANCE BY THE BANKRUPT.

See BANKRUPT, 4.

CONTRIBUTION.

See CERTIFICATE, 9.

COSTS.

See ACTION, 10. PRACTICE, 11. 17. SET-OFF, 2. TAXATION.

1. Where, upon a petition standing over, the petitioner was ordered to pay the costs of the day, which costs he did not pay after demand made, it seems that if an affidavit of such demand having been made had been produced, the petition, when called on, could not have been heard. Ex parte *Leech*, in the matter of *Rowe*, 2 Gl. & Jam. 78.

2. Upon a petition by a lessor to call upon the assignees to elect, the Court has not authority in any case to give costs. Ex parte *Bright*, in the matter of *Clarke*, 2 Gl. & Jam. 79.

3. Where a creditor lodged a detainer against his debtor, and after special bail was filed and not excepted to, he proved his debt, and the bankrupt presented a petition for his discharge, the creditor was ordered to pay the costs. Ex parte *Cross*, in the matter of *Cross*, 2 Gl. & Jam. 100.

4. The costs of a petition by a bankrupt for his certificate, presented after the petition day, will not be allowed. Ex parte *Birch*, in the matter of *Birch*, 2 Gl. & Jam. 206.

5. Where, on a commission of bankrupt being sued out against the plaintiff, he brought an action of trespass against the commissioners for false imprisonment, and was nonsuited, and they entered up judgment accordingly, and the commission was afterwards superseded, on which another was sued out, founded on the same act of bankruptcy as the first, under which the plaintiff obtained his certificate, and the defendants afterwards charged him in execution for the costs of the nonsuit: Held, that he was entitled to be discharged out of custody, as such costs were proveable under the second commission. *Holding* v. *Impey* and others, 7 Moore, 614.

6. If a defendant become bankrupt, and obtain his certificate between verdict and judgment, the costs are not barred. *Biré* v. *Moreau*, 4 Bing. 58.

7. A verdict having been found for the defendant, and a rule for a new trial obtained, the cause was referred to a barrister, and the costs of the cause were to be in his discretion. He found that the plaintiffs were entitled to recover, and ordered the defendants to pay the costs of the cause: Held, that the plaintiffs were not entitled to the costs of the first trial. *Rigby* and others, assignees of *Williams*, v. *Okell* and others, 7 Barn. & Cresw. 57.

DAMAGES.

See ASSIGNEES, 3.

DEFECTIVE WARRANT.

See COMMITMENT.

DETAINER.

See COMMITMENT, 1. COSTS, 3.

DEPOSITIONS.

See ACT OF BANKRUPTCY, 3.

DEBT PROVEABLE.

See PROOF.

DESCRIPTION.

1. Where the residence of the bankrupt was described in the commission as of the town and county of Kingston-upon-Hull, which is generally known by the name of Hull, but the bankrupt actually resided in a place adjoining to it, also generally known by the name of Hull, although in a different parish, but he had in all his trade dealings described himself of Hull; the description held to be correct. Ex parte *Wride*, in the matter of *Wride*, 2 Gl. & Jam. 99.

2. *Semble*, that it would have been incorrect to have described him as of the unknown parish, in which he actually resided. Ibid.

3. A commission wholly omitting to describe the bankrupt of the place where he had chiefly been known as a trader, is bad, though the last place of trading were correctly described. Ex parte *Parrey*, in the matter of *Ford*, 2 Gl. & Jam. 225.

4. The omission to describe the bankrupt, as of the place where he actually traded, is fatal. Ex parte *Beadles*, in the matter of *Lewis*, 2 Gl. & Jam. 243.

DISHONOUR, NOTICE OF.

See PROOF, 23.

DIVIDENDS.

See ALLOWANCE. ASSIGNEES, 4. INTEREST, 1.

If an assignee sign checks for the dividend, and deposit them in a desk, from which they are fraudulently taken by a clerk, who obtains payment from the bankers, it seems that the assignee is liable to the creditor. Ex parte *Griffin*, in the matter of *Dixon*, 2 Gl. & Jam. 114.

DOUBLE PROOF.

See PROOF, 2.

DOCKET.

See COMMISSION, 1, 2.

EJECTMENT.

See INSOLVENT DEBTORS ACT, 3.

ELECTION.

See PROOF, 6.

1. A creditor for goods sold may prove on a bill for part of the debt, and proceed at law on a bill for the remainder, which he had negociated before the bankruptcy, and taken up after the proof. Ex parte *Sly*, in the matter of *Sly*, 2 Gl. & Jam. 163.

2. Where a creditor has two distinct debts by simple contract, the proof of one of the debts is not an election to prove the other. *Bridget* v. *Mills*, 4 Bing. 18.

3. A creditor who has proved, will, upon a petition by the assignees, be restrained from issuing execution against the property of the bankrupt in the possession of the assignees. Ex parte *Bernasconi*, in the matter of *Chambers*, 2 Gl. & Jam. 381.

ELECTION BY ASSIGNEES.

1. On petition by a lessor to compel assignees to elect whether they will accept or decline the lease, the Court has no power, under the statute, to make the assignees to pay the costs, or to give the lessor the costs out of the bankrupt's estate. Ex parte *Bright*, in the matter of *Clark*, 2 Gl. & Jam. 79.

2. The assignee of a bankrupt, lessee of certain premises, kept the bankrupt in the premises carrying on the business for the benefit of the creditors from the 15th of November 1823, when the assignee was chosen, until April following, and himself occasionally superintended; but on the 22d Dec. 1823 disclaimed the lease by letter to the landlord: Held, that the assignee, notwithstanding such disclaimer, had elected to accept the lease, by using the premises for the benefit of the creditors. *Clarke* v. *Hume*, 1 Ryan & Moody, 207.

EQUITABLE MORTGAGE.

1. The petitioner, being equitable mortgagee of the lands of the bankrupt, for 1,200*l.*, advances to him the further sum of 1,350*l.*, and takes a warrant of attorney to secure the last-mentioned sum. The bankrupt afterwards executes to the petitioner a conveyance of the lands in trust to sell; and after payment of the 1,200*l.* and interest, to pay the surplus to the bankrupt; and on the day on which the conveyance is executed, judgment is entered up and execution levied under the warrant of attorney for the 1,350*l.*, and part of that sum is satisfied by the levy: Held, that the petitioner was not entitled to tack the residue of the judgment to the mortgage. Ex parte *Pettit*, in the matter of *Houghton*, 2 Gl. & Jam. 47.

2. An equitable mortgagee is entitled to the rents and produce of the mortgaged estate from the time of presenting his petition for a sale. Ex parte *Bignold*, in the matter of *Hervey*, 2 Gl. & Jam. 273. But quære — see ex parte *Alexander*, in the matter of *Tills*, 2 Gl. & Jam. 275.

3. Executors, who are also trustees, agree to give one of the residuary legatees, as a security for his share, a legal mortgage of real estate, part of the testator's assets, and for the purpose of having the mortgage prepared, they deliver the title deeds to his agents. This gives him an equitable lien on the property as against the executors, though not as against the other residuary legatees. *Hockley* v. *Bantock*, 1 Rus. 141.

EVIDENCE.

See ACT OF BANKRUPTCY, 3.

1. There is not any necessity for putting in the proceedings as evidence, where there is no notice to dispute the commission. *Bevan* v. *Lewis*, 2 Gl. & Jam. 245.

2. An acknowledgment of a debt by a trader who had become bankrupt, by an admission made before the issuing of the commission, to the

attorney employed by the assignees in an action of trover brought by them against a third person on account of the estate, is not admissible in evidence to establish the petitioning creditor's debt in proving the bankruptcy in support of such an action, if the admission were made after the act of bankruptcy. *Smallcombe*, assignee of *Watts*, a bankrupt, v. *Bruges*, 13 Price, 136.

3. The declarations of a bankrupt made before the bankruptcy are not admissible to prove the trading in an action by the assignees. *Bromley*, assignee of *Horne*, v. *King*, 1 Ryan & Moody, 228.

4. Parol evidence is admissible to prove matters deposed by a party on his examination before commissioners of bankrupt material to the inquiry, such matters not being contained in the written examination taken by the commissioners. *Rowland* v. *Ashby* and another, 1 Ryan & Moody, 231.

5. In an action by the assignees of a bankrupt, the bankrupt may allow his attorney before the bankruptcy, to give in evidence privileged communications, though offered as proof of the act of bankruptcy. *Merle* and another, assignees of *Brookes*, a bankrupt, v. *More*.

6. The production of the assignment to the plaintiffs, duly enrolled, is sufficient, without proof of its execution; unless notice has been given that it is to be disputed. *Tucker*, assignee of *Hickman*, v. *Barrow*, 1 Mood. & Malk. 137.

7. The declarations of a party suing as assignee of a bankrupt, made before he became assignee, are not admissible as evidence against him. *Fenwick*, assignee of *Devey*, v. *Thornton*, 1 Mood. & Malk. 51.

8. Where a petitioning creditor's debt arises on a note *indorsed*, or a bill *accepted* by the bankrupt, evidence must be given that the indorsement or acceptance was prior to the act of bankruptcy; the mere production of the instrument bearing an earlier date is not sufficient. *Cowie* and another, assignees of *Robinson*, v. *Harris*, 1 Mood. & Malk. 141.

EXAMINATIONS.

See COMMITMENT.

EXECUTION.

See JUDGMENT. JURISDICTION, 9.

EXPUNGING PROOF.

See COMMISSIONERS, 2.

EXTENT.

The Court (of Exchequer) refused to interfere as a Court of equity on behalf of assignees of a bankrupt, to declare that certain writs of extent in aid, charged to have been sued out colourably for the purpose of obtaining an undue priority in payment of debts owing to the prosecutors of the extents from the bankrupt, there being alleged to be in point of fact no debt due from them to the Crown when the extents were issued, were fraudulently sued out, and to decree on that ground an account and repayment of the sums recovered by the judgments obtained thereon, because it appeared that the money obtained thereby was really due and owing from the bank-

rupt to the prosecutors of the extent at the time, notwithstanding there was ground laid for doubt whether there was a debt due from the prosecutors of the extents to the Crown. A party who has mistaken or misshaped his defence at law cannot require relief in equity. *Evans* and another v. *Tolly* and others, 9 Price, 525.

FACTOR.

See SET-OFF, 5.

FORFEITURE.

See JURISDICTION, 6, 7.

FURTHER DIRECTIONS.

See PRACTICE, 12.

FRAUDULENT COMMISSION.

1. Where a commission is taken out under such circumstances that the Court would not allow it to stand, it will not be allowed to stand, although the fraudulent purpose may be defeated without superseding the commission. Ex parte *Bourne*, in the matter of *Bourne*, 2 Gl. & Jam. 137, overruling ex parte *Bourne*, 1 Gl. & Jam. 311.

2. As to what is a fraudulent commission, see ex parte *Gane*, in the matter of *Keel*, 2 Gl. & Jam. 319.

GAZETTE.

See ADVERTISEMENT.

GUARANTEE.

1. A partner may give a guarantee where the obligation has reference to business connected with the partnership, and where the guarantee is notified to the firm, and they do not dissent from it. Ex parte *Nolte*, in the matter of *Crowder* and Co., 2 Gl. & Jam. 295.

2. Where a warrant of attorney was given with a defeasance, stating it to be given "as a security for 4,000*l.* and lawful interest thereon:" Held, that it was to be construed as a continuing security, and not merely as a security for money then due. *Woolley* and others, assignees of *Dowman* and *Offley*, bankrupts, v. *Jennings* and another, 5 Barn. & Cres. 165.

INSOLVENCY, NOTICE OF.

A letter written by the solicitor of a trader to the solicitor of a judgment creditor (for the exact terms of which see the case), requiring the creditor to delay his execution, which he would be entitled to sue out in a few days, giving as the reason of the application, lest he should so involve the debtor as to render him unable immediately to satisfy his engagements, and proposing to pay the debt by instalments, as the only means of enabling the creditor to realise the whole amount of his demand: Held

not to be such a sufficient notice of the insolvency of the trader as to preclude the creditor, under the 49 G. 3. c. 121., from levying under his execution, as having been brought by such notice within the terms of the proviso of that statute, to be found in the second section, by fixing with him previous knowledge of the bankrupt's insolvency. *Abraham* and another, assignees of *Jacobs*, a bankrupt, v. *George* and another, sheriff of Bristol, 11 Price, 423.

INSOLVENT DEBTORS' ACT.

See PETITIONING CREDITOR'S DEBT, 2.

1. Under the insolvent debtors' act, 1 G. 4. c. 119., by the assignment at the time of petition the assignee takes only such property as the insolvent had at the time of the petition. *Kepper* v. *Marshall* and others, 2 Bing. 372.

2. A creditor of an insolvent withdrew his opposition, after stipulating for and receiving a promissory note for the amount of his debt. The insolvent, after his discharge, was arrested for nonpayment of this promissory note, but settled the action by giving a warrant of attorney, in which his brother joined him, to confess a judgment for the debt, costs, and interest, to be paid by instalments. The Court, on motion, set aside this warrant of attorney, after payment of the first instalment. *Rogers*, administratrix of *Rogers*, v. *Kingston* and another, 2 Bing. 441.

3. Under 1 G. 4. c. 119. the provisional assignee of the Insolvent Debtors' Court may, without application to that Court, sue in ejectment for property assigned to him. *Doe*, dem. *Clark* and others, v. *Spencer*, 3 Bing. 203.

IRISH CERTIFICATE.

See CERTIFICATE, 3.

INTEREST.

See ASSIGNEES, 2. PROOF, 1. 7.

1. In the case of a surplus, interest is to be calculated upon the whole debt to the time of the first dividend, and the amount of the first dividend is then to be subtracted from the whole sum, and interest to be calculated upon the reduced principal to the next dividend, and in the same manner to future dividends. Ex parte *Higginbottom*, in the matter of *Higginbottom*, 2 Gl. & Jam. 123.

2. A surety, who pays after the bankruptcy, cannot, in the event of a surplus, receive interest which the creditor could not have claimed. Ex parte *Houston*, in the matter of *Boyd* and *Benfield*, 2 Gl. & Jam. 36.

3. A separate creditor is not entitled to interest from the surplus, until the joint creditors shall have been paid in full. Ex parte *Minchin*, in the matter of *Minchin*, *Carter* and *Kelly*, 2 Gl. & Jam. 287.

JOINT AND SEPARATE SECURITY.

See SECURITY.

JUDGMENT BY NIL DICIT.

1. The Court will not set aside an execution issued upon a judgment obtained by default, confession, or *nil dicit*, and served and levied by seizure upon the property of a bankrupt before his bankruptcy, the statute 6 Geo. 4. c. 16. s. 108. not rendering the execution in such case void, but merely enacting, that the plaintiff in such execution shall share rateably with the other creditors. *Taylor* v. *Taylor*, 5 Barn. & Cres. 392.

2. Bill does not lie to set aside an execution obtained by *nil dicit*. The remedy is by petition. *Mitchell* v. *Knott*, 2 Gl. & Jam. 293. Sed quære.

3. Where A., having a debt from B. secured by warrant of attorney, entered up judgment by *non sum informatus*, issued a *fi. fa.*, and took from the sheriff a bill of sale of the goods seized; and B. having soon afterwards become bankrupt, his assignees took possession of and sold the goods so transferred to A., who brought an action of trover for them: Held that he was not a creditor, having security for his debt within the 6 Geo. 4. c. 16. s. 108., and that he was entitled to recover. *Wymer* v. *Kemble*, 6 Barn. & Cresw. 479.

4. The Court has not, by stat. 6 Geo. 4. c. 16. s. 108., jurisdiction against the creditor taking out execution upon a judgment obtained by *nil dicit*, where the creditor does not come in under the commission. Ex parte *Botcherby*, in the matter of *Whitehead*, 2 Gl. & Jam. 367.

JURISDICTION.

See BANKRUPT, 1. ELECTION, 3. MESSENGER, 3. TAXATION, 4.

1. Whether there be jurisdiction by petition to charge the representatives of a deceased assignee with 20 per cent. Quære. *Wackerbath* v. *Powell*, 2 Gl. & Jam. 156.

2. If assignees are possessed of property, as property of the bankrupts, which is claimed upon equitable grounds by third persons, the Court will, upon petition, entertain the question whether such property does or does not form part of the bankrupt's estate. Ex parte *Hippins*, 2 Gl. & Jam. 97.

3. If the petitioning creditor be the tool of the solicitor in issuing a fraudulent commission, the Court has, as it seems, jurisdiction to compel the payment of the messenger by the solicitor. *See* ex parte *Burwood*, 2 Gl. & Jam. 70.

4. Whether the Court has jurisdiction, by petition, to enforce the liability of the solicitor to the messenger. Quære. Ex parte *Burwood*, in the matter of *Howard* and *Gibbs*, 2 Gl. & Jam. 70.

5. The Court has jurisdiction to review the quantum allowed by commissioners to assignees in passing their accounts; and the jurisdiction is not confined to the principle upon which the allowance is made. Ex parte *Anthony*, in the matter of *Richards*, 2 Gl. & Jam. 77. Overruling ex parte *Anthony*, 2 Gl. & Jam. 55.

6. Petition by the assignee, praying that the petitioning creditor under a prior commission, who had received a sum of money from the bankrupt, on condition of his not proceeding with such commission, and had accordingly abandoned such commission, might refund the money

so received, dismissed with costs, on the ground that the Court had not jurisdiction. Ex parte *Marshall*, in the matter of *Bell*, 2 Gl. & Jam. 53. But see next case.

7. Whether the Chancellor has jurisdiction to enforce payment from the petitioning creditor of a forfeiture for compounding with the bankrupt. Quære. Ex parte *Dimock*, in the matter of *Locker*, 2 Gl. & Jam. 262; and ex parte *Marshall*, in the matter of *Bell*, ibid. page 265.

8. Petition does not lie to restrain the bankrupt from disputing his commission at law. Ex parte *Glossop*, in the matter of *Kemp*, 2 Gl. & Jam. 268. But see ex parte *Leigh*, 2 Gl. & Jam. 332.

9. Bill does not lie to set aside an execution obtained by *nil dicit*. The remedy is by petition. *Mitchell* v. *Knott*, 2 Gl. & Jam. 293. But see ex parte *Botcherby*, 2 Gl. & Jam. 367.

10. After a commission of bankruptcy has been superseded, the great seal has power over the proceedings, for the purpose of safe custody, and sometimes orders them to be deposited in the bankrupt office. Ex parte *Shaw*, 1 Jac. 270. See also 1 Gl. & Jam. 124.

11. When the bankrupt acquiesces, the Lord Chancellor will, upon petition, restrain him from proceeding at law. Ex parte *Leigh*, in the matter of *Claughton*, 2 Gl. & Jam. 332.

12. The Court has not, by 6 Geo. 4. c. 16. s. 108., jurisdiction over the execution creditor who does not prove. Ex parte *Botcherby*, in the matter of *Whitehead*, 2 Gl. & Jam. 367.

13. Whether the Chancellor has jurisdiction to supersede a commission as to one of two bankrupts, in order to give validity to a subsequent commission against the two with a third. Quære. Ex parte *Burlton*, in the matter of *Coleman*, 2 Gl. & Jam. 344.

14. The Vice-Chancellor has not jurisdiction to direct a petition to be heard before the day for hearing fixed by the Lord Chancellor. Ex parte *Charlton*, in the matter of *Charlton*, 2 Gl. & Jam. 390.

LEASE.

See ORDER AND DISPOSITION, 1. RELATION, 2.

1. A. B. being insolvent, conveyed by deed all his estate to trustees for the benefit of his creditors, with a proviso, that "if all and every the creditors of the said A. B., whose debts do amount to more than 5*l*. shall refuse to execute or otherwise consent to this deed, within six months from the date thereof, the said deed shall be void to all intents and purposes:" Held, that a lease vested in the trustees could not be defeated under this proviso, without an express refusal of every creditor above 5*l*. to execute or consent. *Holmes* v. *Love* and *Tucker*, 1 Ry. & Mood. 138.

2. A lease contained a proviso for re-entry of the lessor, and that the lease should be void on the lessee's assigning without the licence of the lessor. The lessee, in January 1825, executed a deed, which purported to convey all his real and personal property to trustees for the benefit of his creditors. In April 1825, a commission of bankruptcy issued against the lessee, and he was duly declared a bankrupt. Held, that the deed of January 1825 was an act of bankruptcy, and void; that it did not operate as a valid assignment of the tenant's interest in the lease, and

therefore that there was no forfeiture. *Doe*, on the demise of *Ann Lloyd*, v. *Powell* and others, assignees of *Thomas Lloyd*, a bankrupt, 5 Barn. & Cres. 308.

3. The assignee of a bankrupt, lessee of certain premises, chosen on the 15th November 1823, kept the bankrupt in the premises carrying on the business for the benefit of the creditors until April following, and himself occasionally superintended; but on the 22d December 1823 disclaimed the lease by letter to the landlord: Held, that the assignee, notwithstanding such disclaimer, had elected to accept the lease, by using the premises for the benefit of the creditors. *Clarke* v. *Hume*, 1 Ryan & Moody, 207.

LIEN.

See ACTION, 6. EQUITABLE MORTGAGE.

1. If an equitable mortgagee advance a further sum, for which further sum he takes a warrant of attorney; and the debtor afterwards execute to the mortgagee a conveyance of the lands, in trust to sell, and, after payment of the mortgage debt and interest, to pay the surplus to the debtor; and on the day upon which the conveyance is executed judgment is entered up, and execution levied under the warrant of attorney, and part of the latter sum is satisfied by the levy, the mortgagee is not entitled to tack the residue of the judgment debt. Ex parte *Pettitt*, in the matter of *Houghton*, 2 Gl. & Jam. 47.

2. A livery stable keeper may, by express agreement, have a lien for the keep of horses. Where the owner of horses in the possession of a livery stable keeper who had such lien fraudulently took them out of his possession: Held, that the livery stable keeper might, without force, retake the horses, and that the lien would revive. *Wallace* v. *Woodgate*, 1 Ry. & Mood. 193.

3. Where deeds are deposited for the purpose of obtaining credit, the person with whom they are deposited has no lien upon them for what is due to him in respect of the monies previously advanced. *Mountford* v. *Blake* and others, 1 Turn. 274.

4. Where a master and part owner of a vessel consigned her to the defendants, who were ship-brokers, on the several terms of commission, on which the ship papers were handed over to them, and they made disbursements on his account; and he was afterwards arrested, and lay in prison more than two months, on which a commission of bankruptcy was issued against him, and the plaintiffs were appointed his assignees; and whilst he was in prison the defendants adjusted their account with him, and received the balance due to them on account of their disbursements, and at the same time delivered to him the ship's papers: Held, in an action brought by the assignees for the recovery of such balance, that they were not entitled to recover, as the defendants had a lien on the papers, until their account was adjusted and paid; and neither the bankrupt nor his assignees could have disposed of the vessel before the papers were given up. *Thompson* and another, assignees of *Chapman*, a bankrupt, v. *Beatson* and others, 7 Moore, 548.

5. If, upon a dissolution of partnership, it is agreed that certain articles of the partnership stock shall become the exclusive property of one

of the partners, and that a certain fund shall be appropriated to the payment of the debts, and that fund afterwards proves insufficient for the purpose, the other partner has no lien on those articles in respect of such deficiency. *Lingen* v. *Simpson*, 4 Sim. & Stuart, 600.

6. A trader having given to a creditor an order on the executor of her debtor to pay the debt to the creditor, and the executor having received the order, and retained it until the assets of the testator should enable him to pay simple contract debts, and the trader having become bankrupt before payment, the creditor was declared entitled to receive the amount of the order from the executor, notwithstanding a subsequent arrest of the trader. Ex parte *Smith* in re *Rowe*, 3 Swan. 392.

7. Whether the proceedings under a commission of bankrupt that has been superseded are subject to the solicitor's lien. Qu. Ex parte *Shaw*, Jac. 270. See also 1 Gl. & Jam. 124.

8. A banker who has discounted bills for a customer, or accepted bills for his accommodation, has, while such bills remain unpaid, a lien on any negotiable securities of that customer which may come to his hands, and may put the same in suit. And even where, taking into account the bills on both sides, the customer has a balance in his favour of a sum not equal to the amount of any one of them, this surplus cannot be appropriated to any one of the bills in reduction of the claim of the banker suing any of the parties to the bill. *Bolland* and others, assignees, &c. v. *Bygrave*, 1 Ry. and Mood. 271.

9. A wharfinger at Hull claimed a general lien for wharfage, labourage (which comprises landing, weighing, and delivery), and warehouse rent. The claim for the wharfage was admitted; but as to the residue, upon a case stating that in Hull such claim had, in a great majority of instances, been acquiesced in, but in others had been rejected, and that the right had long been, and still was, a disputed point there: Held, that the claim could not be supported, as the right of general lien arises out of express or implied contract, of which the former had not been made, and the latter could not be inferred from the circumstances stated in the case. *Holderness* and another, assignees of *Foxton*, v. *Collinson*, 7 Barn. and Cresw. 212.

10. Where a London banker and a country banker both became bankrupt, and the London banker was at the time of his bankruptcy in possession of short bills, and a mortgage deposited with him in the usual course of dealing, as a security against the acceptances of the London banker, and the assignees of the country banker did not relieve the estate of the London banker from the outstanding acceptances: Held, that the holders of such acceptances were entitled to have a preference to the general creditors, by having the proceeds of the short bills and mortgage applied in liquidation of the acceptances. Ex parte *Waring* and ex parte *Inglis*, in the matter of *Brickwood* and Co. and in the matter of *Bracken* and Co., 2 Gl. & Jam. 403.

LORDS' ACT.

See BANKRUPT, 7.

MARRIAGE SETTLEMENT.

See PROOF, 13.

MASTER'S JURISDICTION.

See TAXATION, 4.

MESSENGER.

1. A messenger having possessed himself of property of the bankrupts under a commission, which, after the choice of assignees, has been superseded, and for which property he had not accounted to such assignees, and a new commission issue, under which the same messenger is continued, — he is liable to account for such property to the assignees under the new commission. Ex parte *Shaw*, in the matter of *Howard* and *Gibbs*, 2 Gl. & Jam. 73.

2. Petition by a messenger, praying that the solicitor to the petitioning creditor, who was insolvent, might pay the messenger's costs up to the choice of assignees, dismissed with costs; the solicitor not being, as agent, liable to the messenger: but his liability must depend upon special contract. Ex parte *Burwood*, in the matter of *Howard* and *Gibbs*, 2 Gl. & Jam. 70.

3. Whether the Court has jurisdiction, by petition, to enforce the liability of the solicitor to the messenger. Quære. Ibid. 72.

4. The assignee of a bankrupt is not liable to the messenger under the commission for fees due to him before the choice of the assignees. *Burwood* v. *Felton*, 3 Barn. & Cres. 43.

MORTGAGE.

See EQUITABLE MORTGAGE.

MORTGAGEE.

See PRACTICE, 15.

NE EXEAT REGNO.

See COMMISSION, 2.

NIL DICIT.

See JUDGMENT.

NONSUIT.

See BANKRUPT, 4.

NOTICE OF ACT OF BANKRUPTCY.

See RELATION, 7.

NOTICE OF INSOLVENCY.

See INSOLVENCY.

NOTICE TO DISPUTE BANKRUPTCY.

See ASSIGNEES, 9. PROCEEDINGS.

In an action by or against assignees of a bankrupt, notice to dispute the bankruptcy, left at the counting-house of the party, with his clerk, is sufficient to exclude the proceedings from being evidence, under 49 G. 3. c. 12. s. 10.; personal service on the assignee is not necessary. *Widger* v. *Browning*, 1 Mood. & Malk. 27.

NOTICE OF DISHONOUR.

See PROOF, 23.

ORDER.

1. Where a debtor is in custody, and a detainer is lodged against him, he is not discharged at law from the detainer until his bail shall have justified, and a judge's order made for his discharge; and where such detaining creditor had proved under a commission against the debtor, it was held, that an order of the Court was necessary for his discharge. Ex parte *Cross*, in the matter of *Cross*, 2 Gl. & Jam. 100.

2. It is not necessary to draw up the order for payment of the costs of day. Ex parte *Leech*, in the matter of *Rowe*, 2 Gl. & Jam. 78.

ORDER AND DISPOSITION.

See ACTION, 5. RELATION, 2.

1. By lease the lessor demised to the lessee a colliery, and all the engines, machinery, and other implements, effects, and things then lying on or about the colliery, or used or employed therewith, and mentioned in a certain inventory and valuation then made, habendum for twenty-one years at a certain rent therein mentioned. The lease contained a proviso for re-entry in case the rent should be in arrear for the space of thirty days, and also a proviso that on the expiration or other sooner determination of the demise the lessee should leave and yield up to the lessor all engines, machines, effects, and things belonging to and used in the said colliery, and that an inventory and valuation should 3 months previous thereto be made and taken by two indifferent persons, to be appointed by the parties respectively, or by an umpire, and such inventory should be compared with the then present inventory and valuation, and that the difference in the value of the engines, &c. should be paid by the landlord or tenant to the other, according as it was greater or less than the value at the time of the letting. The tenant entered and occupied the colliery, machinery, &c., and failing in the payment of the rent, the lease became forfeited, and the landlord recovered a judgment in ejectment in Trinity term 1818, but did not execute his writ of possession until the 9th of November 1819. On the following day the tenant committed an act of bankruptcy. The lease having become forfeited by the act of the tenant, no inventory or valuation of the machines and other effects and things belonging to the collieries was made three months be-

fore the determination of the demise. Held, however, as the tenant by his own act had determined the lease, and had thereby rendered it impracticable for the landlord to have a valuation made three months before the determination of the demise, that the latter was entitled, without any such valuation having been made, to resume the possession of the fixtures, machinery, and other effects used in the colliery, upon the determination of the demise by such forfeiture, and that he was entitled to resume such possession, even of new machinery erected by the tenant during the term: Held, 2dly, that the tenant never had, under this demise, the possession, order, or disposition of the fixtures or moveable articles within the meaning of the 21 Jac. 1. c. 19., but a mere qualified right to use them during the term; and if they had been in his possession, &c. within the meaning of the statute, that would have ceased when the landlord resumed possession on the 9th of November. During the intermediate time between the recovery of the judgment in Trinity term 1818 and the execution of the writ of *hab. fac. pos.* on the 9th of November 1819, the bankrupt continued to work the colliery, and to have the use of the machinery and implements: Held, that during this period the bankrupt had not the order or disposition of the machinery and implements within the meaning of the statute of James. *Storer* and others, assignees of *Fletcher*, a bankrupt, against *Hunter*, 3 Barn. & Cres. 368: and see *Horn* v. *Baker*, 9 East, 215; *Lingard* v. *Messiter*, 1 Barn. & Cres. 308; *Ryall* v. *Roll*, 1 Atk. 165.

2. Goods which, with the consent of the true owner, come to the possession of a party after he becomes a bankrupt, do not vest in the assignees under 21 Jac. 1. c. 19. s. 11., and he becomes a bankrupt on committing the act of bankruptcy, which is followed up by a commission. A party who purchases goods under a distress irregularly conducted has a sufficient title to maintain trover. *Lyon* v. *Weldon* and others, 2 Bing. 334.

3. The bankrupt was in the possession of property as apparent owner, under an instrument which, though in appearance a lease, was in effect a contrivance to secure the seller of the property the price to be paid, together with ten per cent. interest on the amount until it should be paid: Held, that the bankrupts having obtained the apparent ownership by means of this fraud would not prevent the assignees from recovering it under the statute of James 1. *Sinclair* and another, assignees, v. *Stevenson*, 2 Bing. 514.

4. The directors of a company assigned their salaries and shares to the company, to secure debts due from them on their private accounts, and empowered the company to direct the treasurer to retain their salaries and dividends, and sell their shares for payment of their debts. One of the directors became bankrupt, but the power given to the company had not been exercised, and his shares still remained in his name. Held, that they passed to his assignees, as being in his order and disposition, but that the company had a right to set-off against the bankrupt's debt the dividends and salary due to him at his bankruptcy. *Nelson* v. *The London Assurance Company*, 2 Sim. & Stu. 292.

5. Where plaintiff purchased goods in the East India Company's warehouses, received the invoices, and paid the price; but the vendor retained warrants in his possession, which he subsequently pledged to the defen-

dant, and afterwards became bankrupt: Held, that as the vendor had not the goods in his possession at the time of his bankruptcy, and could not have obtained them without paying the defendant, they were not within "his possession, order, and disposition," within the statute, and that the plaintiff therefore was entitled to recover. *Greening* v. *Clarke*, 4 B. & Cr. (K.B.) 316., and 6 D. & Ry. 375.

6. If a trader represent himself to a landlord of a house that he is a man of property, and refer him to his banker's account, which the landlord does not examine, but which is false, and the landlord let him into possession, in which he continues for four months, and then becomes bankrupt: this is a possession by the consent of the owner. *Sinclair* v. *Stevenson*, 10 B. Moore, 48.

7. It is not necessary to go into the minutiæ of title to property, under the statute of James. *D. Park, J. Sinclair* v. *Stevenson*, 10 B. Moore, 52.

8. If a person order goods to be sent to him at night, and early the next morning commits an act of bankruptcy, he must be taken to have obtained possession of them by artifice or fraud. *D. Best, C. J., Sinclair* v. *Stevenson*, 10 B. Moore, 53.

9. If a bond be given to satisfy a relation of the obligee's that the debt is due, and the obligee give a covenant to the obligor that the bond shall not be enforced, the bond is not so in the order and disposition of the bankrupt as to induce a Court of equity to order the covenant to be cancelled. *Stork* v. *Tolson*, 1 Russell, 556.

PARTIES.

See PLEADING.

PARTNERS.

See CLAIM. GUARANTEE, 1. PROOF, 12. 18.

1. A., B., and C. were in partnership in trade. A. retired from the firm, and notice of that fact was given to D., a creditor of the firm, and that B. and C. continued the business and assumed the funds, and charged themselves with the debts of the partnership. The balance due to D. was transferred to his credit by the new firm, and D. was informed of this transfer, and assented to it. He afterwards drew upon the new firm for a part of this balance, and they accepted and paid his bills. The new firm having become insolvent, it was held that A. continued liable for the debt due to D. from the old firm. *David* v. *Ellice, J. B. Inglis*, and *James Inglis*, surviving partners of *John Inglis*, deceased, 5 Barn. & Ce s. 196.

PARTNERSHIP.

See PROOF.

1. Where one partner gives the acceptance of the firm for his separate debt, without authority from his co-partners, such acceptance cannot be enforced by the separate creditor. Ex parte *Goulding*, in the matter of *O'Neill*, 2 Gl. & Jam. 118.

2. If four of a firm of five partners, as bankers, carry on partnership

as bankers, the assignees under a commission against the five may prove a debt due from the four. Ex parte *Castell*, in the matter of *Wentworth*, 2 Gl. & Jam. 124.

3. Where different firms are engaged in a joint adventure, the creditors of the adventure may prove against the joint estates of the minor partnerships. Ex parte *Nolte*, in the matter of *Crowder* and Co., 2 Gl. & Jam. 295.

4. Assignees under a joint commission may recover in the same action a debt due to all the members of a firm, and to one of the members of a firm. *Graham* v. *Mulcaster*, 4 Bing. 115.

PAYMENTS.

See RELATION.

1. Payment by bankers, to one of several trustees, of the proceeds of stock sold out under a joint power of attorney from the trustees, does not discharge the bankers as against the other trustees, unless previously authorized by them. *Stone* and another v. *Marsh, Stracey*, and *Graham*, 1 Ryan & Mood. 364.

2. Where bankers, employed to receive dividends in the funds, had in their own books credited their employers with the dividends as received, and had allowed them to draw, without having any other funds in their hands: Held, that the bankers were bound by the entries so acted on, though not communicated, and that they could not set up as a defence, that the entries had been fraudulently made by one of the partners, the money never having been received by the house. *Hume* and another v. *Bolland* and others, assignees of *Marsh, Stracey, Graham* and *Fauntleroy*, bankrupts, 1 Ryan & Mood. 371.

3. Where a commission was sued out on the petition of A. B., founded on an act of bankruptcy in December, and it appeared that in the preceding October the bankrupt, by a deed to which A. B. was a party, assigned all his property: Held, that the assignees (although A. B. was not one of them) could not avail themselves of this deed as an act of bankruptcy, in order to recover money subsequently paid by the bankrupt, inasmuch as the creditors, represented by the assignees, derived all their rights under the commission from the petitioning creditor, who was a party to the deed.

The money sought to be recovered had been deposited by the bankrupt in the hands of an arbitrator, who was to decide to whom it belonged. The arbitrator, before the commission issued, and without knowledge of any act of bankruptcy having been committed, paid the money over to the person whom he thought entitled to receive it: Held, that the assignees could not recover it from the arbitrator. *Tope* and another, assignees of *Ford* v. *Hockin*, 7 Barn. & Cres. 101.

4. A. was the agent of the grantor, and the grantee of certain annuities; all payments on account of the annuities passed through his hands, and he charged the grantee a commission upon all such payments. A. delivered to the grantee an account, gave him credit for half a year's annuity, describing it as "money not yet received," and debited him with commission upon the same. In fact it had not been received by A.; and he having afterwards become bankrupt, it was held, that his assignees were entitled to be allowed that sum in an account by the grantee.

5. So where in one account credit was given to the grantee for certain sums, as money actually received by A., and they had never been received; and in another account subsequently delivered the same sums were placed to the debit of the grantee, *with his assent*, it was held, that the assignees of A. were entitled to be allowed those sums in account. *Shaw* and others, assignees of *Howard* and *Gibbs*, v. *Dartnall*, 6 Barn. & Cresw. 56.

6. A payment made in order to obtain possession of goods or property to which a party is entitled, and of which he cannot otherwise obtain possession at the time, is a compulsory, and not a voluntary payment, and may be recovered back.

7. The agent for the grantee of several annuities delivered him four accounts in the course of eighteen months, and gave him credit for all the half yearly instalments of the several annuities then due, but stated that some of them had not been received. He charged commission on all the instalments, and paid the balance of the accounts as if they had been received; and in the latter accounts never brought forward those sums, nor intimated that he expected them to be repaid. Held, upon a bill of exceptions, that upon this evidence the jury were properly told by the judge that they might infer an agreement whereby the agent made himself personally responsible for the payment of those annuity instalments in default of payment by the grantors. *Shaw* and others, assignees of *Howard* and *Gibbs*, v. *Woodcock*, 7 Barn. & Cresw. 73.

8. Payment by weekly instalments, in discharge of a debt for goods sold to the bankrupt, is not a payment "in the usual and ordinary course of trade and dealing," so as to be protected by the 19 G. 2. c. 32. s. 1, *Bolton* and another, assignees, &c. v. *Jager* and another, 1 Ryan and Mood. 265.

9. A., a merchant in London, ordered goods to be made by B., a manufacturer in the country. The goods were made to order, but, before they were forwarded to A., B. committed an act of bankruptcy, and afterwards shipped the goods, having previously, but after the act of bankruptcy, drawn upon A. a bill of exchange for a larger sum than the price of the goods ordered, which bill A. accepted, not then knowing that B. had committed an act of bankruptcy. The goods having afterwards come to the possession of A., it was held, that the assignees were entitled to recover them, because the property in them remained in the bankrupt, both at the time when the act of bankruptcy was committed, and when the bill was accepted by A., and therefore this was not a payment protected by the 1 Jac. 1. c. 15. s. 14. because A. was not a debtor of B. at the time when the acceptance was given. *Bishop* and others, assignees of *Hornblower*, a bankrupt, against *Crawshay* and others, 3 Barn. & Cres. 415.

10. Where a creditor, without any knowledge of the insolvency, paid the bankrupt a bill which became due after the act of bankruptcy, which bill the bankrupt immediately indorsed and paid away: Held, that is was a payment protected. *Bennett* v. *Spackman*, 1 Carr. (N.P.) 274.

11. A payment made by a person on the verge of bankruptcy, to another having claims on him, but who is aware of his insolvency, is valid, as a *bonâ fide* transaction, within the statute 6 Geo. 4. c. 16. s. 81., if no commission issue till more than two months after the payment. *Tucker*, assignee of *Hickman*, v. *Barrow*, 1 Mood. & Malk. 137.

PERJURY.

See AFFIDAVIT, 2.

PETITION.

See COSTS, 4. JURISDICTION, 2. 4. 8, 9. PRACTICE, 16.

PETITIONING CREDITOR.

See JURISDICTION, 7. COMMISSIONERS, 2.

1. A petitioning creditor, who, shortly before the issuing of the commission, had taken out execution against the bankrupt for part of the debt on which the commission issued, ordered to furnish the assignees with the particulars of his debt, and the time at which it was contracted, in aid of an action brought by the assignees against the sheriff, impeaching the execution on the ground of its being over-reached by an act of bankruptcy, which was available against the execution if a competent part of the petitioning creditor's debt were contracted before it. Ex parte *Glover*, in the matter of *Mundell*, 2 Gl. & Jam. 60.

2. The petitioning creditor under a joint commission, after the bankruptcy has been found under a separate commission, may compel the production of the proceedings under the separate commission, in order to discover the act of bankruptcy. Ex parte *Harrison*, in the matter of *Groves* and *Little*, 2 Gl. & Jam. 135.

3. Where the bankrupt's assets in the hands of the assignee are greater than the amount of his debts, and the creditors who have proved consent to the *supersedeas*, and the petitioning creditor receive the whole amount of his debt, interest, and costs, it is not a compounding within the 8th section of 6 Geo. 4. c. 16. Ex parte *Smith*, in the matter of *Smith*, 2 Gl. & Jam. 291.

4. Where a private act of Parliament, entitled "An act to enable a certain insurance society to sue and be sued in the name of their secretary," enacted that they might commence all actions and suits in his name as nominal plaintiff: Held, that this did not enable the secretary to petition, on behalf of the society, for a commission of bankruptcy against their debtor. *Guthrie* and *Bunyon*, assignees of *Savory*, v. *Fisk* and *Patteson*, 3 Barn. & Cres. 178.

5. The deposition of the petitioning creditor, at the opening of the commission, is not a proof to entitle him to vote in the choice of assignees. Ex parte *Rawson*, in the matter of *Duncan*, 2 Gl. & Jam. 358.

PETITIONING CREDITOR'S DEBT.

See ACTION, 7.

1. A petition to substitute a petitioning creditor's debt cannot be maintained until an application has been made to the commissioners to expunge the debt upon which the commission issued. Ex parte *Chappell*, in the matter of *Williams*, 2 Gl. & Jam. 131.

2. A creditor whose debt had been omitted in the schedule filed in the Court for the Relief of Insolvent Debtors, by an insolvent who had obtained his discharge under the Insolvent Acts, may maintain a com-

mission founded on that debt. Ex parte *Shuttleworth*, in the matter of *Pacey*, 2 Gl. & Jam. 68.

3. In December 1811, G., then abroad, being indebted in the sum of 1,000*l.* to the estate of W., a bankrupt, the assignees of W. issued against him writs of special *ca.*, *alias*, and *pluries*, in Michaelmas term 1812, and Hilary term 1813, which were delivered to the sheriffs of London, and by them duly indorsed *non est invent.*; but the writs remained in the sheriff's office. In 1814 G., being on board a ship in the Downs, waiting for a fair wind, went several times to Deal, but W.'s assignees had not notice of his being there. In 1819, G. returned to reside in England. In 1821, the debt of 1,000*l.* being still unpaid, the assignees of W. struck a docket against G., and upon their petition a commission issued against him, and on the 21st of March in that year he was declared a bankrupt. G. petitioned to have the commission superseded; and by an order of the Vice-Chancellor, made May 1821, it was ordered that G. should be at liberty to bring trover against his assignee to try the validity of the commission; which action he accordingly commenced, 19th May 1821. Two days afterwards the attorney for the petitioning creditors took away the writs of special *ca.*, *alias*, and *pluries* from the sheriff's office, and on the 11th of July 1821, the last day of Trinity term, a roll of the proceedings, with the continuances on the writ of *pluries*, brought down to the term next preceding the date of the commission issued against G., was docketed and carried in, and on the same day the three writs were filed of record. Upon a case stating these facts, held, that the assignees of W. had not at the time of suing out the commission awarded and issued against G., or on the 21st of March 1821, when he was declared a bankrupt, a valid debt, as petitioning creditors, to support the commission. *Gregory* v. *Hurrill*, 5 Barn. & Cres. 341.

4. Where a petitioning creditor's debt arises on a note *indorsed*, or a bill *accepted* by the bankrupt, evidence must be given that the indorsement or acceptance was prior to the act of bankruptcy; the mere production of the instrument bearing an earlier date is not sufficient. *Cowie* v. *Harris*, 1 Mood. & Malk. 141.

PLEADING.

See ASSIGNEES, 1, 2.

1. Declaration in *sci. fa.* stated that "R. S. (the plaintiff in the original action) became bankrupt, whereupon a commission was duly awarded against him, and E. F., R. B., and J. T., (the plaintiffs in the *sci. fa.*) were duly chosen assignees of the estate and effects of the said R. S., under the commission, and now on behalf of the said E. F., R. B., and J. T., as assignees as aforesaid, we have been informed, &c.:" Held, that this was good (defendant not having demurred to it) without an express averment that an assignment of the bankrupt's effects was made, for that the expression "assignees as aforesaid" might mean persons to whom an assignment has been made; and the 5th of Geo. 2. c. 30. s. 26. having directed the choice of assignees to be followed up by an assignment of the effects to the persons chosen, the Court might presume that such an assignment was made. Semble, that the objection would have been

fatal if made the ground of special demurrer. *Fletcher* and others, assignees of *R. Simpson*, v. *Pogson* and *Thomas*, 3 Barn. & Cres. 192.

2. Where in an action of assumpsit the declaration stated, that the defendant was indebted to the plaintiff, as assignee of J. S. a bankrupt, for goods sold and delivered to the defendant, and monies lent and advanced to him, and on account stated between him and the plaintiff as such assignee; and it was proved that the goods had in fact been sold by the bankrupt to the defendant, with the concurrence of and for the benefit of two former assignees, whose appointment was afterwards ordered to be vacated by the Lord Chancellor, and the plaintiff was thereby appointed a new assignee in their stead: Held, that the action was properly brought, and the declaration well framed, although it was objected, either that the former assignees should have been made parties, or the fact of their having been removed, and the plaintiff substituted in their place, and that the sale was made previously to his appointment, should have been stated in the declaration. *Aldritt*, assignee of *Skarratt*, v. *Kittridge*, 8 Moore, 372.

3. To a bill by assignees of a bankrupt against a creditor, a plea that the suit was not instituted with the consent of the creditors at a meeting pursuant to the 5 Geo. 2. c. 30. s. 38., was allowed. *Ocklestone* v. *Benson*, 2 Sim. & Stu. 265. But quære. See *Bevan* v. *Lewis*, 2 Gl. & Jam. 245.

4. In an action by assignees of a bankrupt, the declaration stated the cause of action to be money had and received to the use of the bankrupt; the particulars of the demand described it as had and received to the use of the plaintiffs. This is not such a variance as to prevent the plaintiffs from recovering, it not appearing that the defendant could be misled by it. *Tucker*, assignee of *Hickman*, v. *Barrow*, 1 Mood. & Malk. 137.

PRACTICE.

See Assignees, 5. Commission. Costs. Description. Payments, 3. Taxation. Trustees.

1. The chancellor will refer to the surviving commissioner, to certify that the consent to a supersedeas is signed by all the creditors. Ex parte *Wallis*, in the matter of *Wallis*, 2 Gl. & Jam. 25.

2. Where a country commission is amended for a trifling defect, without notice, on the twenty-seventh day after the docket is struck, a creditor who applies with new docket papers is not entitled to priority. Ex parte *Harman*, in the matter of *Niven*, 2 Gl. & Jam. 26.

3. No objection to an affidavit, that it was not entitled in the bankruptcy in which it was used, if, from the accompanying circumstances, it be manifest that it was judicially used in the bankruptcy. Ex parte *Simonds*, in the matter of *Marsh*, *Dean* and Co., 2 Gl. & Jam. 44.

4. Where, upon a petition standing over, the petitioner was ordered to pay the costs of the day, which costs he did not pay, after demand made, an affidavit of such demand must be produced when the petition is called on, in order to enable the respondent to object to the hearing. Ex parte *Leech*, in the matter of *Rowe*, 2 Gl. & Jam. 78.

5. It is not necessary to draw up the order for payment of the costs of the day. Ibid.

6. If the name of one of the com-

missioners be mis-spelt, the Chancellor will, after the declaration of the bankruptcy and the adjudication by such commissioner, order the other commissioners to proceed to a new adjudication. In re *Barber*, 2 Gl. & Jam. 81.

7. A petition to substitute a petitioning creditor's debt cannot be maintained, until an application have been made to the commissioners to expunge the debt upon which the commission issued. Ex parte *Chappell*, in the matter of *Williams*, 2 Gl. & Jam. 131.

8. The title to a petition in bankruptcy is not vitiated by its being also entitled "In chancery." Ex parte *Hudson*, in the matter of *Clarke* and *Ramsden*, 2 Gl. & Jam. 228.

9. A commission directed to new commissioners cannot issue after judgment by another list of commissioners against the bankruptcy. Ex parte *Nicholls*, in the matter of *Summersett*, 2 Gl. & Jam. 266.

10. A petition, which upon the face of it does not appear to be by a solicitor, must be properly attested. Ex parte *Cole*, in the matter of *Hole*, 2 Gl. & Jam. 269.

11. Rule as to the liability of the original petitioning creditor for costs upon substitution of a petitioning creditor's debt. Ex parte *Cousins*, in the matter of *Addis*, 2 Gl. & Jam. 270.

12. Where a petition is ordered to stand over until after a trial, there need not be a new petition for further directions. Ex parte *Window*, in the matter of *Rowe*, 2 Gl. & Jam. 280.

13. The Court will order an exoneretur to be entered on the bail-piece in all cases where the defendant is entitled to be discharged out of custody; and therefore, where a defendant obtained a certificate under a commission of bankruptcy before trial, and did not plead *et puis darrein continuance*, the Court relieved the bail on motion. *Todd* and others v. *Maxfield*, 3 Barn. & Cres. 222.

14. Where a mortgagee becomes bankrupt, and a bill of foreclosure is filed against him and his assignees, the Court will not, on the application of the assignees alone, make an immediate decree under 7 Geo. 2. c. 20. *Garth* v. *Thomas*, 2 Sim. & Stu. 188.

15. Mode of proceeding where the assignees apply as mortgagees for a sale. Ex parte *Cowdry*, in the matter of *Levett*, 2 Gl. & Jam. 272.

16. A petition cannot be advanced by the Vice-Chancellor before the day of petitions for which it has been answered: except by consent. Ex parte *Charlton*, in the matter of *Charlton*, 2 Gl. and Jam. 390.

17. When the petitioner does not appear, the respondent is entitled to his costs upon producing an office copy of the petitioner's affidavit of service. Ex parte *Garth*, 2 Gl. & Jam. 392.

18. The husband must join in a docket by a feme covert upon a debt due to her in *autre droit*. Ex parte *Mogg* in the matter of *Mogg*, 2 Gl. & Jam. 397.

PREFERENCE.

If a lessee, upon the termination of his lease, agree that the landlord shall take the fixtures at a valuation, and he pays the difference due for the rent, which is a month before he becomes bankrupt, — and the lessee has, previous to such payment, examined his affairs, and found that he was able to pay 17*s.* in the pound,

— and if, upon the expiration of the lease, the debtor send two or three times to the lessee about the calculation of the fixtures, and sell part of his stock to raise money to pay the balance when the valuation is completed, — and he is indebted to his bankers in 1,700*l.*, who desire him to shorten his account, — and he pay in 200*l.* shortly before his bankruptcy, thinking the bank will give him a little time, — and if having a large sum to make up about the same time for duty, he sell his watch and plate, and some malt, at a loss, and the payment made by him to the landlord is to exonerate his sureties, and because he expects other creditors will get possession of his property, although he has no intention at the time to become bankrupt, — and some time before the bankruptcy, he says that nothing but a bankruptcy can settle his affairs; — the jury will be properly directed to consider whether the lessee, at the time of payment, knew he could not go on, and that there was a probability of his becoming a bankrupt, and had preferred a particular creditor in contemplation of bankruptcy. *Hook*, assignee of *Dring*, v. *Jones*, 4 Bing. 20.

PRINCIPAL AND SURETY.

See CERTIFICATE, 5. PROOF, 3, 4.

1. A surety paying after the bankruptcy to a creditor who has proved, can only stand in his place upon the bankrupt's estate; and in case of a surplus, can claim no interest which the creditor could not have claimed. Ex parte *Houston* and ex parte *Boyd*, in the matter of *Boyd* and *Benfield*, 2 Gl. & Jam. 36.

2. If a surety in a bond with the debtor give, after the bankruptcy of the debtor, a new bond to the creditor, in lieu of the old bond, he is not entitled by virtue of such security to prove under the commission. Ex parte *Serjeant*, in the matter of *Parkinson*, 2 Gl. & Jam. 25.

3. Where two persons execute a bond, the one as principal, the other as surety, and no other assurance is executed at the time, the surety paying the bond debt is a simple contract creditor only of the principal. *Copis* v. *Middleton*, 1 Turner, 224.

4. Proof for the value of the annuity by the annuity creditor, under the 17th section of the statute, does not discharge the sureties of the grantor from their liability to the grantee, as being an election under the 14th section. The surety is therefore entitled to sue the grantor on the bond for indemnifying him, notwithstanding he hath obtained his certificate, for money paid by such surety, at any time after the grantor's bankruptcy, in discharge of the annuity, whether by payment of the arrears subsequently accruing due, or by the redemption of the annuity; and the grantor cannot plead his bankruptcy and certificate in bar of such an action; but the certificate is a bar to an action for the money paid by the surety for the arrears due at the time of the bankruptcy. *Watkins*, gent. v. *Flannagan*, esq., 13 Price, 24.

PRIVILEGE FROM ARREST.

Where a bankrupt is about to be taken in execution, the Court will not enlarge the time for the bail surrendering, upon an affidavit which does not state where the defendant lived, or when the commission was sued out. *Shaw* v. *Cash*, 4 Bing. 80.

PRIVILEGE OF SOLICITOR.

See SOLICITOR.

PROCEEDINGS.

See JURISDICTION, 10. PETITIONING CREDITOR, 2.

1. There is not any necessity for putting in the proceedings as evidence, where there is no notice to dispute the commission. *Bevan* v. *Lewis*, 2 Gl. & Jam. 245.

2. In an action by assignees of a bankrupt, for a demand for which the bankrupt, if solvent, might sue, the depositions are conclusive evidence of the matters contained in them, unless the bankrupt, within the time prescribed by the statute 6 Geo. 4. c. 16. s. 92., gives notice of his intention to dispute the commission, although the action was commenced, and notice given by the defendant that he would dispute the act of bankruptcy, &c. within the time allowed to the bankrupt to give such notice, if the cause be not brought to trial till after that time is elapsed. *Earith*, assignee of *Trollope*, v. *Schroder*, 1 Mood. & Malk. 24.

PROOF OF DEBT.

See ANNUITY. CLAIM. ELECTION.

1. Monies advanced by the petitioner to the bankrupt, secured by promissory notes, whereby the bankrupt promised to pay after three months notice the monies advanced, with interest at five per cent. Two years' interest had been paid before the commission, but no notice had been given: Held, that the petitioner was entitled to prove the principal monies and interest up to the commission. Ex parte *Elgar*, in the matter of *Mantle*, 2 Gl. & Jam. 1.

2. A. and B. were in partnership, B. being a secret partner; and A., on the partnership account, drew bills in his own name on B., which were accepted by him: Held, on the bankruptcy of A. and B., that the holder of these bills, who was ignorant of the partnership, was not entitled to prove them against the joint estate of A. and B. and the separate estate of B., but that he was entitled to prove them against the separate estates of A. and B.: Held also, that the holder, having proved against the joint estate, might, after a declaration of dividend of the joint estate, retire from that proof, and prove against the separate estates. Ex parte *Husbands*, in the matter of *Blackburn*, 2 Gl. & Jam. 4.

3. C. and Co. being embarrassed, the Bank of England agreed to advance them 40,000*l.* upon acceptances of the friends of C. and Co. The acceptances were given, and the acceptors, or in case of any of them dying, declining, omitting, or ceasing to renew, any substituted acceptors, were secured by C. and Co. assigning to trustees for that purpose certain property in America. Two of these acceptances were thus: C. and Co. drew a bill on J. and W. J. for 2,500*l.*, which they accepted, and it was indorsed by C. and Co. to the bank. R. accepted another bill to that amount, drawn by J. and W. J., which was also given to the bank. The bills, when they became due,

were renewed. Before the renewed acceptance of J. and W. J. became due, they stopped payment; and R., the drawer, being called upon, he obtained an acceptance from C. T. T., and indorsed it to the bank, and the acceptance of J. and W. J. was therefore delivered to him. J. and W. J. becoming bankrupt, R. proved the amount of their acceptances in his possession, and received 18*s.* in the pound: Held, on appeal, that the proof was right. Ex parte *Hunter* and others, assignees, &c.; ex parte *Reyner*, in the matter of *Goodchild*, 2 Gl. & Jam. 7.

4. Surety in a bond for the bankrupts, after the bankrupts are certificated, joins with them and a new surety in a new bond to the representatives of the creditor, and the old bond is delivered up to the surety: Held, that this was not payment by the surety within Sir Samuel Romilly's act, so as to enable the surety to prove under the commission. Ex parte *Serjeant*, in the matter of *Parkinson*, 2 Gl. & Jam. 23.

5. A joint creditor, having a separate security from one of his co-debtors, admitted to prove his debt against the joint estate without surrender or sale of his security. Ex parte *Peacock* and others, in the matter of *Bell*, 2 Gl. & Jam. 25.

6. Where a debt of 27,620*l.* was due from the bankrupts at the bankruptcy, to their bankers, on a balance of account, and such balance was secured by the joint promissory notes of the bankrupts to the extent of 18,000*l.*, and also by a mortgage of some property belonging to the bankrupts, with joint and several covenants from each of them for the payment of the whole balance; and part of the debt, to the amount of 17,000*l.*, had been permitted to be proved against the joint estate upon petition by the bankers, for the purpose of commanding the choice of assignees: Held, that the bankers were entitled to prove the 18,000*l.* against the joint estate, and the residue against the separate estate of one of the bankrupts. Ex parte *Ladbroke*, in the matter of *Parkes*; ex parte *Mills*, in the same matter, 2 Gl. & Jam. 81.

7. Upon a promissory note, as follows: "Borrowed and received of S. D., August 20, 1816, four hundred pounds, which I promise to pay, with five per cent. interest for the sum." It is agreed that six months' notice shall be previously given before payment is required; and interest was paid until fourteen months before the commission issues against the maker. Although no notice was given or demand made before the date of such commission, the debt is proveable. Ex parte *Downman*, in the matter of *Downman* and *Offley*, 2 Gl. & Jam. 85; overruled on appeal, 2 Gl. & Jam. 241.

8. Where a creditor had a lien upon a bond, which, if immediately sold, might have been unproductive, but which, with proper management, might prove valuable, the creditor was permitted to prove his whole debt, upon undertaking to account for the surplus, after payment to the creditor of his whole debt. Ex parte *Smith* and *Strickland*, in the matter of *Bunscomb*, 2 Gl. & Jam. 105.

9. Where B. purchased an annuity from C. through the agency of the bankrupts, and the consideration money was received by the bankrupts as agents for C., and placed by them to C.'s account, and they afterwards became bankrupts: Held, that B. could not prove the consideration paid for the annuity, unless it were established that the grant of the annuities was merely colourable, con-

trived for the purpose of obtaining B.'s money in payment of a debt due from C. to the bankrupts. Ex parte *Shaw*, in the matter of *Howard* and *Gibbs*, 2 Gl. & Jam. 106.

10. Where one partner gives the acceptance of the firm for his separate debt, without authority from his co-partner, such acceptance cannot be enforced against the firm by the separate creditor. Ex parte *Goulding*, in the matter of *O'Neill*, 2 Gl. & Jam. 118.

11. Where two or more, part but not all of a larger firm, are partners in a distinct trade, and the aggregate firm becomes bankrupt, and one of the firms be indebted to the other in respect of a dealing arising out of its distinct trade, such debt can be proved by the one firm against the other. Ex parte *Castell* and others, in the matter of *Wentworth*, 2 Gl. & Jam. 124.

12. A partner cannot prove against his copartner upon indemnifying the joint estate. Proof not payment. Ex parte *Moore*, in the matter of *Sheath*, 2 Gl. & Jam. 166; ex parte *Gibson*, in the matter of *Minchin*, 2 Gl. & Jam. 233.

13. A sum covenanted by the husband to be paid when demanded by the trustees, on the request of the wife, is, if demanded before the bankruptcy, proveable. Ex parte *Brenchley*, in the matter of *Brenchley*, 2 Gl. & Jam. 174.

14. A seller abroad of contraband goods is entitled to prove, unless he be a participator in smuggling them. Ex parte *Cavaliere*, in the matter of *Powell*, 2 Gl. & Jam. 227.

16. Where different firms are engaged in a joint adventure, the creditors of the adventure may prove against the joint estates of the minor partnerships. Ex parte *Nolte*, in the matter of *Crowder* and Co., 2 Gl. & Jam. 295.

17. If the acceptor for a valuable consideration compound, without the knowledge of the drawer, with the bill holder, the acceptor is, in account between him and the drawer, entitled to credit for the full amount of the bill. *Stonehouse* v. *Read*, 3 Barn. & Cresw. 669.

18. A partner cannot prove or claim until all the joint debts are paid. Ex parte *Ellis*, in the matter of *Badnall*, 2 Gl. & Jam. 312.

19. The plaintiff in an action of trespass having obtained a verdict, signed final judgment after the defendant had committed an act of bankruptcy, but before the issuing of a commission: Held, that the debt was proveable under a commission subsequently issued, and that the defendant, who had been arrested on a *ca. sa.*, was entitled to be discharged on obtaining his certificate. *Robinson* v. *Vale*, 2 Barn. & Cres. 762.

20. Where part of the account between two mercantile houses which became bankrupt consists of bills that may be proved against both estates, there can be no proof in respect of those bills as between the two houses, unless there is a surplus after satisfying the holders of the bills. Ex parte *Rawson*. Ex parte *Lloyd*, Jac. 274.

21. Where a promissory note, payable with interest twelve months after notice, was expressed to be "for value received," and the maker became bankrupt before any notice was given: Held, that the payee might prove it under the commission. *Clayton* v. *Gosling*, 5 Barn. and Cres. 360.

22. Where the party had been employed by the bankrupt in making a distress under an improper authority,

and compelled to pay damages, whereupon he brought assumpsit on the undertaking that the bankrupt had a sufficient authority to employ him, and on the 4th of June obtained a verdict and damages, and final judgment signed thereon on the 16th of June as of Trinity Term, which commenced on the 7th; on the 15th a commission of bankruptcy issued, founded on an act of bankrupcy committed on the 17th of May preceding: Held, that the party had, at the date of the commission, a debt proveable under it. *Birch*, ex parte, 4 Barn. & Cres. (K. B.), 880; and 6 D. & R. 436.

23. The drawer of a bill of exchange became bankrupt, and absconded before it was due; but his house remained open in the possession of the messenger, under a commission of bankruptcy issued against him for some time after the bill became due, and before that time the holder of the bill had notice that A. and B. were chosen assignees of the bankrupt's estate. The acceptor also became bankrupt before the bill was due, and when due it was dishonoured. The holder did not give notice of the dishonour to the drawer, or leave it at his house, nor did he make any attempt to give such notice to the assignees of the drawer: Held, that the bill was not proveable under the commission issued against the drawer. *Rohde* and *Campbell* v. *Proctor* and *Morley*, 4 Barn. & Cres. 517.

24. Where a creditor has two distinct debts by simple contract, the proof of one of the debts is not an election to prove the other. *Bridget* v. *Mills*, 4 Bing. 18.

25. If a defendant become bankrupt, and obtain his certificate between verdict and judgment, the costs are not proveable. *Birè* v. *Moreau*, 4 Bing. 58.

26. If a trader covenant for the due payment, by a debtor, of the premiums upon a policy of insurance, to secure the debt, and the trader become bankrupt, the certificate is not a bar to an action of covenant by the creditor for the payment of the premium accruing due after the bankruptcy. *Attwood* v. *Partridge*, 4 Bing. 209.

27. If a banking house, by means of a sale of stock of certain trustees, being their customers, made under the orders of the house, and transfers, signed part by one of the partners and part by another, to receive the price and proceeds of the stock, — and the money is paid by the broker who effects the sales, into the banking house, by a payment to their agents in the city, — and it is so paid generally, and never appropriated by the house to any particular account, — the house is liable to the trustees, notwithstanding the power of attorney to sell the stock is forged by one of the partners of the house, who, in the name of the firm, draws out the money from the agents, and applies it to his own use, and notwithstanding such partner is himself one of the trustees. *Stone* v. *Marsh*, 6 Barn. and Cresw. 562.

28. A proof cannot be made by one person on behalf of several creditors entitled to prove, unless from necessity or by consent. Ex parte the Bank of England, in the matter of *Marsh* and Co., 2 Gl. & Jam. 363.

29. The deposition by the petitioning creditor, at the opening of the commission, is a proof only to authorise the commissioners to adjudicate. Ex parte *Rawson*, in the matter of *Duncan*, 2 Gl. & Jam. 353.

PROPERTY DISTRIBUTABLE.

See ASSIGNEES. RESTRAINT OF ALIENATION.

PROTECTION.

See COMMITMENT.

PROVING, CONSEQUENCES OF.

Where at a meeting of creditors it is resolved that expences are to be borne by the creditors in the usual way, each creditor is liable for a part of the expences in proportion to the amount of his debt; but he is not liable for the share of the others. *Taylor* v. *Cohen*, 4 Bing. 56.

REGISTRY ACT.

A. agreed with B. for the absolute purchase of a ship for the price of 7,850*l.*; but A. being unable to pay the purchase money, it was stipulated that the sale and transfer of the ship should be deferred until he could pay the purchase money in the manner therein-after mentioned, and that in the meantime B. should continue the legal owner of the ship, and should be responsible for her outfit, &c. so as to enable the ship to proceed on her intended voyage to India and back, under the command of A. and on his account. Covenants by A. to pay to B. all monies, costs, and charges which, since the completion of the last voyage, had been paid by him on account of the outfit or costs of supplying the ship and the premiums of insurance, until the transfer was made; and also that A. should pay all port charges and disbursements subsequent to the sailing of the ship on her then intended voyage, and to pay the purchase money in manner following: first, by two instalments of 500*l.* each, the further sum of 4,000*l.* by bills of lading and invoice for goods shipped on board the ship for her then intended voyage, and which goods were to be made deliverable to B. or his assigns, to the intent that he might dispose of the same in India, and invest the proceeds in other goods to be shipped on board the ship, and to be made deliverable to B. in London, or invest the same in bills, and then the net amount of such goods or bills to be in further payment of the purchase money. Covenant by B. that at the expiration of three months next ensuing the arrival and report inwards of the ship in London from her then intended voyage, and upon A.'s paying the sum thereby intended to be secured, and performing the covenants therein contained, that he (B.) would transfer to him the ship. At the time of the execution of the agreement, the ship was in the port of London, where she was registered. There was no indorsement of the agreement on the certificate of the registry; but in pursuance of the agreement, A. had possession, and fully loaded her on his own account, and sailed on the voyage to India. A. paid to B. the two instalments, and delivered to him a bill of lading of goods valued in the invoice at 4,000*l.* which were consigned by B. to merchants at Calcutta. A. left those goods at Madras, and then proceeded to Calcutta, where he relinquished the command. A. became bankrupt, and did not complete the purchase of the ship, nor pay the residue of the

purchase money. Held, first, that an executory contract for the sale of a ship was within the statute 34 G. 3. c. 68. s. 15., and therefore that the contract for the sale of the ship was void, for want of an indorsement of the agreement on the certificate of registry: Held, secondly, in assumpsit by the assignees of A. against B., that the true principle of taking the account between the parties was to charge the assignees for the sum for which the ship might have been let or chartered for such a voyage, with such expenditure (if any) as properly belonged to the freighter of the ship, and such further expence and loss to any, as B. had been put to by the misconduct of A. in the management of the ship, and allow to the assignees of A. the sums received by B. in respect of the transactions. *Mortimer* and others, assignees of *Merriman*, a bankrupt, v. *Fleming*, 4 Barn. & Cres. 120. E. 6 G. 4.

RELATION TO ACT OF BANKRUPTCY.

1. A release executed by the bankrupt after an act of bankruptcy, to a re-lessee who knows of the bankrupt's insolvency, is not valid, although executed more than two months before the suing out of the commission. *Mavor*, assignee of *W. H. Pyne*, v. *Pyne*, 3 Bing. 285.

2. A lease was granted to W., who afterwards committed an act of bankruptcy, and then executed a declaration of trust in favour of R. On the trial of an issue, directed by the Court, it was found that W.'s name was used in trust for R. Held, that the lease did not pass to W.'s assignees. *Gardner* v. *Rowe*, 2 Sim. & Stu. 346.

3. Where the defendants ordered goods of a manufacturer who committed an act of bankruptcy before delivering them, and the defendants had accepted a bill for a sum exceeding the price: Held, first, that the assignees were entitled to recover back the goods, as the property remained in the hands of the bankrupt at the time the act of bankruptcy was committed: Secondly, that assuming the acceptance to be equivalent to payment, the defendants not being the debtors of the bankrupt at the time, it was not protected as a payment within the usual course of trade, within 1 Jac. c. 15. s. 14. *Bishop* v. *Crawshay*, 3 Barn. & Cresw. 414., and 5 D. & Ry. 279.

4. If the owner of a ship transfer to his creditor, by any way of security, a ship on her voyage home, and certain policies of insurance effected upon her, with a proviso for redemption on payment of the debt, and, upon failure of payment, with power of sale to the creditor; and if, the money not being paid, the creditor take possession of the vessel on her return home, and give notice to the parties who have goods on board, and claim the freight, and the brokers employed by the debtor to collect the sums of money due to him receive from the creditor a cheque for the payment of the bill and the seamen's wages, after which the debtor becomes bankrupt, — the creditor is entitled, after the bankruptcy, to receive from the brokers the amount of the cheque from the freight received by the brokers. *Dean* v. *M'Ghie*, 4 Bing. 46.

5. If a debtor to a trader have notice given to him by a creditor of the debtor not to pay the debt, as a docket will be struck against the trader, and the debtor, on the next morning, when the payment is de-

manded, refuse, in consequence of this notice, to pay the debt, and on the same morning another creditor give notice to the debtor not to pay, as a docket is about to be struck, and upon a subsequent demand for payment the debtor refuse to pay without an indemnity, upon which being given, payment is made, and the jury from this find that the debtor had notice of the act of bankruptcy, the sum must be repaid to the assignees under a subsequent commission. *Spratt* v. *Hobhouse*, 4 Bing. 174.

6. Where a debtor to a trader gave an unstamped order, not on a banker, for the payment of his debt, this is not such an obligation to pay as to justify the payment after notice of an act of bankruptcy. *Spratt* v. *Hobhouse*, 4 Bing. 179.

7. Where enough has been done to put a debtor on his guard, so as to give him reason to believe that his creditor is a bankrupt, it has been said that this is notice of an act of bankruptcy, as absolute certainty of the fact is not necessary, for notice does not mean knowledge. *Spratt* v. *Hobhouse*, 4 Bing. 182.

8. Notice of an intention to strike a docket is not in itself sufficient notice of an act of bankruptcy. *Spratt* v. *Hobhouse*, 4 Bing. 182.

9. Where a principal, after he had committed a secret act of bankruptcy, remitted monies to his factor, to provide for bills which the factor had accepted on account of the principal, and a commission issued, the factor could not retain the sums so remitted within two months of the commission. *Kinder* v. *Butterworth*, 6 Barn. & Cres. 42.

RESTRAINT OF ALIENATION.

1. Where a testator gave real and personal estate to trustees to pay an annuity to his son, and the will stated, "I do direct and declare that the said annuity or yearly sum of 500*l.* by me given to my son John Graves, for his life as aforesaid, is by me intended for his personal maintenance and support during the whole time of his natural life, and shall not, nor shall any part thereof, on any account or pretence whatever, be subject or liable to the debts, engagements, charges, or incumbrances of him my said son; but that the same shall, for the purpose aforesaid from time to time, as and when the same shall from time to time become due and payable, be paid over into the proper hands of him my said son only, and not to any other person or persons whatsoever; and I do further direct that the receipt or receipts of him my said son only shall be good and sufficient discharges to my said trustees for the same," and the son became bankrupt,—the annuity was held to be distributable under the commission. *Graves* v. *Dolphin*, 1 Simons, 67.

2. Where a patent was granted on condition that, if the patentee made any transfer or assignment, or declared any trusts thereof to or for any number of persons exceeding the number of five,—or in case the said power, privilege, or authority should at any time become vested in or in trust for more than the number of five persons or their representatives, at any one time, otherwise than by succession, (reckoning executors and administrators as and for the single person they represent, as and to such interest as they are or shall be entitled to in right of such their testators or testator,)—then and in every of the

said cases all liberties and advantages whatsoever thereby vested should utterly cease, determine, and become void, and a commission of bankruptcy issue against the patentee, and there are more than five creditors under the commission, the patent is not void, but vests in the assignees. *Bloxam* v. *Elsee*, 6 Barn. & Cresw. 172.

REPUTED OWNERSHIP.

See ORDER AND DISPOSITION.

SCANDAL AND IMPERTINENCE.

See AFFIDAVIT.

SECURITY.

See GUARANTEE.

1. A security for a separate demand does not extend to a joint demand. Ex parte *Freen*, in the matter of *Starkey*, 2 Gl. & Jam. 246.

2. The interest of partners, as tenants in common, where the estate was purchased out of the joint property, and mortgaged by the firm for a joint debt, is a joint security. Ex parte *Free*, in the matter of *Burgess*, 2 Gl. & Jam. 250.

SERVICE OF PETITION.

See PRACTICE, 17.

SET-OFF.

See ORDER AND DISPOSITION, 4.

1. Where the customer of a banker discounted, at his bankers, two bills of exchange drawn by him and accepted for his accommodation, and the bankers became bankrupts, having negotiated one of the bills, and having a cash balance of the customer's in their possession to a greater amount than both the bills,—and the assignees proceeded against the acceptor; the Court, upon a petition presented by the drawer and the acceptor, ordered the bills to be delivered up to the drawer in part discharge of the cash balance, with liberty to prove for the difference. Ex parte *Hippins* and *Harrison*, in the matter of *Sykes* and Co., 2 Gl. & Jam. 93.

2. The costs of judgment, as in case of a nonsuit entered up against the plaintiff after he has become bankrupt, cannot be set-off against the costs of an action by the bankrupt's assignees against the defendant in the former action. *West* and another, assignees of *Price*, v. *Pryce*, 2 Bing. 455.

3. If a plaintiff withdraw the record, and after a commission of bankruptcy has issued against him, judgment, as in case of a nonsuit, is signed; and if the assignees afterwards commence an action and recover a verdict against the same defendant for the same cause of action, he cannot set-off the costs of the nonsuit against the costs of the action in which the verdict is obtained. *West* v. *Pryce*, 10 B. M. 154.

4. If the agent for the grantor and grantee of an annuity receive all payments on account of the annuities, and charge the grantor a commission upon all such payments, and the

agent deliver to the grantor, and give him credit for half a year's annuity before it is actually received, and by such credit induced the grantor to suppose that the payments had been made by the grantee, the grantor is entitled to charge them in account; but if they are entered as money not yet received, or having been originally entered as money received, and the entry rectified with the consent of the grantor, it cannot be so charged. *Shaw* and others, assignees of *Howard* and *Gibbs*, v. *Dartnall*, 6 Barn. & Cresw. 56.

5. Where dealings between a trader and his factor continued after the trader had committed an act of bankruptcy, and up to the time of the issuing of a commission: Held, that the assignees might recover from the factor all sums of money received by him from the bankrupt, within two months before the issuing of the commission; and that the factor could not set-off his debts incurred by the bankrupt to him during that period, although he did not know of the act of bankruptcy. *Kinder* v. *Butterworth*, 6 Barn. & Cresw. 42.

SEQUESTRATION.

A debt contracted in England by a trader residing in Scotland is barred by a discharge under a sequestration issued in conformity to the 54 G. 3. c. 137., in like manner as debts contracted in Scotland. *Sidaway* v. *Hay*, 3 Barn. & Cres. 12.

SHORT BILLS.

1. The proprietor of short bills, which are negociated by the country banker, is entitled to be indemnified from surplus security held by the London banker. Ex parte *Armitstead*, in the matter of *Dilworth*, 2 Gl. & Jam. 371.

2. What constitutes short bills. Ibid.

SMUGGLING.

See PROOF, 14.

SPECIFIC PERFORMANCE.

Specific performance decreed, at the suit of the vender, of a contract for the sale of debts proved under a commission of bankruptcy. *Adderley* v. *Dixon*, 1 Sim. & Stu. 607.

STATUTE OF FRAUDS.

A delivery order for wine lying in the London docks, given by the vender to the vendee, held not to be a sufficient acceptance of the wine to take the case out of the statute of frauds. *Bentall* and others, assignees of *Baker* and others, v. *Burn*, 1 Ry. & Mood. 107.

STATUTE OF LIMITATIONS.

1. After the issuing of a commission, the statute of limitations does not run against a creditor of the

bankrupt. Ex parte *Ross*, in the matter of *Coles*, 2 Gl. & Jam. 46. Confirmed upon appeal, 2 Gl. & Jam. page 330.

2. Where one of two partners being abroad, writs of *capias*, *alias*, and *pluries*, returnable in Michaelmas term 1812, and Hilary term 1813, were sued out against both, with a view to outlawry against the former; but a commission of bankruptcy having been sued out against the other partner resident in this country, the proceedings as to the outlawry were suspended, and the absent partner never returned to this country until 1819, except by touching at Deal in 1814, for a mere temporary purpose, on his passage from one foreign port to another; and in 1821 a fresh action was commenced against him in K. B. for the same debt, but as he avoided an arrest, a commission of bankruptcy was issued against him in that year, and he afterwards commenced an action in this Court, to try the validity of the commission, and previously to the trial, but after the commission, continuances were entered up on the former writs issued in 1812 and 1813, and regularly brought down to the term before the latter trial: Held, that the debt on which the commission was founded was not barred by the statute of limitations; but at the time of issuing the said commission it was a good petitioning creditor's debt. And it seems that the touching at Deal was not a return to this country from beyond seas within the meaning of the statute 21 Jac. 1. c. 18. ss. 3. 7. *Gregory* v. *Hurrill*, 8 Moore, 189.

STOPPAGE IN TRANSITU.

1. If the course of dealing between a firm at Lisbon (which has also a house of trade in London) and a house at Manchester is, that the house at Lisbon, when it requires goods to be purchased for them at Manchester, address a letter to the house at Manchester, under cover to the London house, by which house the letter is transmitted to Manchester, and the goods purchased in the name of the London house, and usually forwarded by the way of Liverpool to Lisbon; and the seller then draws on the London house, at three months, for the amount; and if the goods are so bought by the London house, and the vendor is informed that they are to be sent to Lisbon as on former occasions, and the goods are delivered to commission agents in Manchester, with an invoice, making the London house debtors, and the goods are to be forwarded to Lisbon, and while the goods are in the warehouse of the commission agent the London house becomes bankrupt, the transit is not at an end, as the goods are to be forwarded to Lisbon, and the vendor may stop them. *Coates* v. *Railton*, 6 Barn. & Cresw. 424.

2. It is a general rule that where goods are sold to be sent to a particular destination named by the vendee, the right of the vendor to stop them continues until they arrive at such place of destination. *D. Bayley*, *J. Coates* v. *Railton*, 6 Barn. & Cresw. 424.

3. Where goods are to be delivered to the vendee at a particular place, the transitus in general continues until they are delivered to him at that place; but if he by his own act prevent the delivery, which otherwise in the ordinary course would take place,

and does any act equivalent to taking possession, the transitus is thereby terminated; and therefore, where the vendee of several hogsheads of sugar, upon receiving from the carrier notice of their arrival, took samples from them, and for his own convenience desired the carrier to let them remain in his warehouse until he should receive further directions, and before they were removed became bankrupt, it was held that the transitus was at an end, and that the vendor was not entitled to stop them. *Foster* and others, assignees, v. *Frampton*, 6 Barn. & Cresw. 107.

SUBSTITUTION OF PETITIONING CREDITOR'S DEBT.

See PRACTICE.

SUPERSEDEAS.

See PETITIONING CREDITOR, 3.

1. Supersedeas ordered on certificate by the surviving commissioner of the names of the creditors who had proved. Ex parte *Wallis*, in the matter of *Wallis*, 2 Gl. & Jam. 25.

2. Where the bankrupt was abroad when the commission issued, and avowing his intention of not returning to England, made an offer of 15*s.* in the pound upon the commission being superseded, a supersedeas was ordered, on a petition for that purpose, signed by the solicitor of the bankrupt and all the creditors who had proved, and upon the certificate by the commissioners of such signature, although the bankrupt had not surrendered. Ex parte *Carling*, in the matter of *Carling*, 2 Gl. & Jam. 35.

3. A bankrupt who has not surrendered may sustain a petition to supersede the commission against him, where the petition is presented before the forty-second day. Ex parte *Nicholls*, in the matter of *Nicholls*, 2 Gl. & Jam. 101.

4. Where a commission is taken out for the purpose of putting an end to an action by the bankrupt against the petitioning creditor, and not for the purpose of its operating as a commission for the benefit of the creditors, it will not be permitted to stand, even though an intention of working it for the legitimate purposes of a commission be afterwards adopted. Ex parte *Bourne*, in the matter of *Bourne*, 2 Gl. & Jam. 137. Overruling ex parte *Bourne*, V. C. 1 Gl. & Jam. 311.

5. A bankrupt cannot, after he has obtained his certificate, petition to supersede, because he was not a trader. Ex parte *Lewis*, in the matter of *Lewis*, 2 Gl. & Jam. 208.

6. A commission will not be superseded upon the petition of the bankrupt before surrender, even with consent of creditors. Ex parte *Peaker*, in the matter of *Peaker*.

7. Whether a commission can be superseded as to one of two bankrupts, in order to give validity to a subsequent commission against the other with a third. Ex parte *Burlton*, in the matter of *Coleman* and others, 2 Gl. & Jam. 344.

8. A joint commission, invalid in its concoction, may be superseded as to one of the bankrupts. Ex parte *Bygrave*, in the matter of *Pratt* and *Ravenscroft*, 2 Gl. & Jam. 391.

SUPPLEMENTAL BILL.

See ASSIGNEES, 5.

SURETY.

See CERTIFICATE, 9. PRINCIPAL AND SURETY.

SURPLUS.

See BANKRUPT, 2.

1. In the case of a surplus, interest is to be calculated upon the whole debt to the time of the first dividend, and the amount of the dividend is then to be subtracted from the whole sum, and interest to be calculated upon the reduced principal to the next dividend, and in the same manner to future dividends. Ex parte *Higginbottom*, in the matter of *Higginbottom*, 2 Gl. & Jam. 123.

2. A separate creditor is not entitled to interest out of the surplus, until the joint creditors shall have been paid. Ex parte *Minchin*, in the matter of *Minchin*, 2 Gl. & Jam. 287.

SURRENDER.

1. A bankrupt may petition to supersede before the third public meeting, without having surrendered. Ex parte *Nicholls*, 2 Gl. & Jam. 101.

2. Where the bankrupt was abroad previous to a commission issuing against him, and he, continuing abroad, arranged with his creditors, who consented to the commission being superseded, it was ordered to be superseded without his surrender. Ex parte *Carling*, in the matter of *Carling*, 2 Gl. & Jam. 35.

3. The commission cannot, after the forty-second day, be superseded on the application of the bankrupt before his surrender, even with consent of creditors. Ex parte *Peaker*, in the matter of *Peaker*, 2 Gl. & Jam. 337.

TAXATION OF SOLICITOR'S BILL.

1. If the assignees and their solicitor are not permitted to be present at the taxation of the bill of the solicitor to the petitioning creditor up to the choice of assignees, the Court will order it to be referred to be taxed by the master. Ex parte *Palmer*, in the matter of *Funston*, 2 Gl. & Jam. 34.

2. Where a commission is superseded by an arrangement between the bankrupt and his creditors, part of which is, that the bankrupt shall pay the solicitor's bill prior and subsequent to the choice of assignees, and the bankrupt pay such solicitor's bill without taxation, the Court afterwards ordered it to be taxed. Ex parte *Heyden*, in the matter of *Heyden*, 2 Gl. & Jam. 52.

3. Commissioners are to tax bills of costs from time to time, and are not to wait until the whole business of the commission is concluded. Ex parte *Gore*, in the matter of *Turner*, 2 Gl. & Jam. 117.

4. A master's jurisdiction to tax the bill of costs of the solicitor to a commission, under 5 Geo. 2. c. 3. s. 46., not conclusive until the mas-

ter shall have signed his certificate. Ex parte *Neale*, in the matter of *Norris*, 2 Gl. & Jam. 226.

5. A petition to tax a bill after payment must state objectionable items. Ex parte *Beresford*, in the matter of *Lingard*, 2 Gl. & Jam. 259.

TRADING.

See DESCRIPTION.

1. A devisee for life, who converts the soil into bricks, is not a trader. Ex parte *Burgess*, in the matter of *Burgess*, 2 Gl. & Jam. 183.

2. A buying in connection with others, with a view to carry on a system of fraud, is not trading; but if a party represent himself a dealer, buying goods and offering goods in exchange, it is a question for the jury to say if he does not buy to sell again. *Millikin* v. *Brandon*, 1 Carr. (N.P.) 380.

TRANSITUS.

See STOPPAGE IN TRANSITU.

TRUSTEE.

See ACTION, 4. PAYMENTS, 1.

1. Upon application to substitute a new trustee under 6 G. 4. c. 16. s. 79., in the place of a bankrupt trustee, the Court will, if necessary, order a reference to the master to approve of a proper trustee. Ex parte *Saunders*, in the matter of *Symonds*, 2 Gl. & Jam. 132.

2. A new trustee may be appointed, under 6 Geo. 4. c. 16. s. 79., without a reference to the master. Ex parte *Inkersole*, in the matter of *Inkersole*, 2 Gl. & Jam. 230.

VICE-CHANCELLOR.

See JURISDICTION, 14.

WARRANT OF ATTORNEY.

The statute 3 Geo. 4. c. 39. s. 2., (as to the filing of warrants of attorney to render the judgments on them effectual against subsequent commissions of bankruptcy), is not repealed by 6 Geo. 4. c. 16. s. 81.

Quære, whether the statute 3 G. 4. c. 39. s. 2. extends to cases where there has been no act of bankruptcy at the time of giving the warrant of attorney. *Wilson* v. *Whitaker*, 1 Mood. & Malk. 8.

UNCERTIFICATED BANKRUPT.

See BANKRUPT, 2.

VENDOR AND VENDEE.

See STOPPAGE IN TRANSITU.

WARRANT OF COMMITMENT.

See COMMITMENT.

WHARFINGER.

See LIEN, 9.

WITNESS.

See SOLICITOR.

In an action on a bill of exchange accepted for the accommodation of the drawer, who has become bankrupt and obtained his certificate, the bankrupt, having released his assignees, is a competent witness for the acceptor. *Ashton* v. *Longes*, 1 Mood. & Malk. 127.

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